

APPENDIX

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 78-5066

IRVING JEROME DUNAWAY,

Petitioner,

—vs.—

STATE OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI FILED JULY 14, 1978
CERTIORARI GRANTED NOVEMBER 27, 1978

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RELEVANT DOCKET ENTRIES

1. Order of Appellate Division, Fourth Department affirming defendant's judgment of conviction without opinion (June 29, 1973)
2. Order of the New York State Court of Appeals affirming defendant's conviction without opinion (October 23, 1974)
3. Defendant's petition for certiorari filed with Supreme Court (January 25, 1975)
4. Order of the United States Supreme Court granting defendant's motion for leave to proceed *in forma pauperis* and for certiorari which remanded this case to the New York Court of Appeals (June 30, 1975)
5. Order of the New York Court of Appeals remanding this case to the Monroe County Court for further proceedings (December 29, 1975)
6. Decision and order of the Monroe County Court suppressing defendant's confession as being obtained in violation of his Fourth Amendment Rights (March 11, 1977)
7. Order of the Appellate Division, Fourth Department reversing the order of the Monroe County Court (March 1, 1978)
8. Order of the Appellate Division, Fourth Department denying defendant's motion to reargue the appeal (April 7, 1978)
9. Certificate of the New York State Court of Appeals dismissing defendant's application for leave to appeal (May 10, 1978)
10. Order of the New York State Court of Appeals denying defendant's motion to reargue the application for leave to appeal (June 13, 1978)
11. Defendant's petition for certiorari filed with Supreme Court (July 14, 1978)
12. Order of the United States Supreme Court granting defendant's motion for leave to proceed *in forma pauperis* and for certiorari (November 27, 1978)

STATE OF NEW YORK
COUNTY COURT
COUNTY OF MONROE

Indictment No. 458

THE PEOPLE OF THE STATE OF NEW YORK

—vs.—

IRVING JEROME DUNAWAY AND THOMAS JAMES MOSLEY

ORDER

The above named defendant, Irving Jerome Dunaway, having brought the following motions: (a) a motion for Discovery and Inspection pursuant to CPL Section 240.10 et seq. asking to discover and inspect any statement made by him, and also any reports, documents, examinations, made in connection with the case, and any photographs made at the scene; and (b) a motion to disclose any evidence favorable to the accused under the doctrine of *Brady v. Maryland*, 373 U.S. 83, and (c) a motion for a bill of particulars pursuant to CPL Section 200.90; and (d) a motion to suppress any statement made by him pursuant to Section 710.20 (3) of the CPL; and (e) a motion to suppress tangible evidence pursuant to Section 710.20(1) and (f) also to suppress any identification evidence pursuant to Section 710.20(5), and said motions coming on to be heard on the 11th day of November, 1971, Charles F. Crimi, Esq., appearing on behalf of the defendant Dunaway, and Jack B. Lazarus, District Attorney of Monroe County, Eugene Bergin, Esq., of counsel, appearing for the People of the State of New York and it further appearing that the People of the State of New York, have complied with the demands of the defendant as to the (a) motion for discovery and in-

spection, and the People having represented to the Court that they are not in possession of any evidence favorable to the accused as to the motion (b) to discover such evidence, and the People having complied with the demands for particulars as to the motion (c) for bills of particulars and it appearing further that the People do not intend to offer into evidence any physical, tangible evidence as sought to be suppressed by (e) the motion to suppress pursuant to Section 710.20(1), and the People further do not intend to offer any identification evidence as sought to be suppressed by (f) the motion to suppress pursuant to Sec. 710.20(5); and it further appearing therefore that the sole remaining motion be the motion (d) to hold a hearing and to suppress any statement made by the defendant Dunaway pursuant to Section 710.20(3) of the CPL, now on motion of Charles F. Crimi, Esq., attorney for Defendant Dunaway, it is hereby

ORDERED, that a hearing be held prior to the trial, to determine the admissibility of any statement, written or oral, made by the defendant Dunaway, pursuant to Section 710.60(4).

December 9, 1971

/s/ George D. Ogden
GEORGE D. OGDEN
County Court Judge

Filed Apr. 20, 1973

STATE OF NEW YORK
COUNTY COURT
COUNTY OF MONROE

THE PEOPLE OF THE STATE OF NEW YORK

—vs.—

IRVING JEROME DUNAWAY, THOMAS JAMES MOSLEY,
DEFENDANTS

HALL OF JUSTICE, ROCHESTER, NEW YORK

Presiding: HONORABLE GEORGE D. OGDEN,
Monroe County Court Judge.

TRANSCRIPT OF PROCEEDINGS OF HUNTLEY
HEARING AND TRIAL—February 24, 1972

* * * *

[3] (February 24, 1972—10:51 A.M.—Court convened—
Defendants present and by counsel.)

MR. BERGIN: May it please the Court, the People move for trial in the case of the People of the State of New York versus Irving Jerome Dunaway and Thomas James Mosley, Indictment No. 458, filed August 26, 1971.

MR. DONOVAN: The Defendant Mosley is ready, Your Honor.

MR. CRIMI: The Defendant Dunaway is ready.

THE COURT: Are both defendants to be tried together in the one action?

MR. DONOVAN: Yes, Your Honor.

THE COURT: Mr. Crimi?

MR. CRIMI: As far as Dunaway is concerned, Your Honor, it is my understanding that there is no statement going to be used. If there is a statement of the co-

defendant Mr. Mosley, and at the present time it does not appear that I do have any grounds for a separate trial.

THE COURT: All right. Are you ready, Mr. Donovan?

[4] MR. DONOVAN: I am ready, Your Honor.

THE COURT: Mr. Crimi?

MR. CRIMI: Yes, Your Honor.

MR. BERGIN: The People are ready.

Your Honor, the People do intend to offer at this trial a statement and/or admission made by the Defendant Dunaway, and we are ready to proceed with a Hearing, if the Court orders such.

I would like to say at this time, Your Honor, that the Defendant Thomas James Mosely did make a statement to the police upon his arrest, a stenographic statement which I have given a copy to Mr. Donovan. It is not our intention to use the statement in the trial in chief of the prosecution, Your Honor.

MR. DONOVAN: I, therefore, have no desire for any Huntley Hearing on the part of the Defendant Mosely.

MR. CRIMI: Well, at the present time, Your Honor, if the District Attorney represents that the statement of the co-defendant is not going to be used I still think that I am [5] entitled to a severance.

THE COURT: Do you want a Huntley Hearing?

MR. CRIMI: Yes. I had moved for a Huntley Hearing and one had been ordered, Your Honor.

THE COURT: All right.

MR. BERGIN: The People are ready. While we are on the statements I might just say for the record that I have given to Mr. Crimi a copy of the stenographic statements made by his client and also a copy of the statement made by the Defendant Mosley, and I have also provided Mr. Donovan with copies. Is that right?

MR. DONOVAN: Acknowledged.

MR. CRIMI: Yes.

THE COURT: All right.

* * * *

[30] FRANCIS NOVITSKEY, Detective with the Rochester Police Bureau, called herein as a witness on behalf of the People of the State of New York, having first been duly sworn, was examined and testified as follows:

[31] DIRECT-EXAMINATION

BY MR. BERGIN:

Q. You are with the Rochester Police Bureau?

A. Yes, I am.

Q. What is your position there, sir?

A. Detective, Physical Crimes Squad.

Q. How long have you been with the Police Bureau?

A. Twenty years.

Q. Now, Detective, on the morning of August 11, 1971, did there come a time while you were there at the Public Safety Building and that you had occasion to see the Defendant Jerome Irving Dunaway?

A. Yes, I did.

Q. That is Irving Jerome Dunaway?

A. Yes.

Q. Could you tell the Court what time it was that you first saw Mr. Dunaway?

A. It was about 9:00 A.M. on the 11th of August.

Q. Was he brought into the Bureau by some officers?

A. Yes, he was.

Q. Can you tell us what transpired after you first saw Dunaway; what happened, please?

A. Well, I advised him of his constitutional rights. He waived same.

[32] Q. Now, what—

MR. CRIMI: I object to the conclusions of the answers here.

THE COURT: Sustained.

Q. Was this in a certain office in the Detective Bureau?

A. Yes, it was in an interview room.

Q. Just how did you go about advising the defendant of his constitutional rights?

A. I advised him verbally that he had a right to remain silent; that he did not have to answer any questions if he did not wish to; that anything he did say would be used against him in a Court of Law. He had a right to consult with an attorney before answering any questions; to have an attorney present with him during the questioning by us if he so desired; if he could not afford an attorney, one would be provided for him; if he did consent and agree to discuss this matter without an attorney present he could terminate the discussion at any time. I asked him if he understood these rights. He stated he did. I asked him if he agreed to waive these rights and consent to discuss the matter with me, and he stated he would.

Q. Did you use one of these police waiver cards, detective?

[33] A. Yes.

Q. Do you have that present with you?

A. Yes, I do.

MR. BERGIN: Would you mark this, please?

(Whereupon People's Exhibit No. 1 was marked for identification: a notification and waiver card.)

Q. Detective, I show you a card marked Exhibit 1 for identification, and ask you what this is?

A. This is the notification and waiver card.

Q. Did you have occasion to use this particular card in the morning of August 11th?

A. Yes, I did.

Q. Is there some writing on the back of that card?

A. Yes, there is.

Q. Would you tell us what that is?

A. It has the date, 8-11-71; time, 9:30 A.M.; place, Room 478, Public Safety Building; person interviewed, Irving Dunaway; persons interviewing, I signed it myself, Novitskey, and Detective Sal Ruvio also signed it.

Q. Do you recall, detective, if you read this card to the defendant Dunaway or if you gave him the rights as you did here from your own memory of these?

[34] A. I gave it to him as I did here. I had the card right there with me.

Q. You get to know these after a while?

A. Certainly do.

Q. I understand this card is being revised now?

A. It's to be revised, yes.

Q. But, Mr. Dunaway did say that he understood what you told him?

A. Yes, he did.

Q. He said he would discuss this with you without a lawyer?

A. Yes, he did.

Q. Could you tell us what was said after that took place?

A. Well, he stated that he and another youth—

Q. Did you ask him questions or—

A. Yes, I did. I asked him about the homicide at the pizza parlor on Genesee Street. I asked if he knew anything about it. He stated he did. He told me that he was there when it happened. He stated that they were going to the bridal shop first. They changed their mind, walked away to the pool room again. They later returned to the bridal shop. It was closed. They looked over the pizza shop. He knew the name of it, the Tower of Pizza. He said there was someone [35] coming out of the pizza shop and someone was walking up the street. They waited until these people cleared away, and at this time he and his accomplice entered the store, the accomplice having the gun, a sawed off shotgun. He described it as a double barrel, double triggers. Upon entering the store there was a white woman behind the counter who headed toward the swinging doors to the rear of the store, and stated something to the effect that he has a gun. On this, a man came out from the back room through these swinging doors, and he was headed toward the cash register at the time.

Q. Who was?

A. Mr. Dunaway, over there.

Q. And he—

A. And he heard the gun go off. He wanted to run out of the store. He fell up against the door, and injuring his ear. He ran down Clifton Street up Epworth Street, Lennox Street to an aunt's house where he had

his ear treated. He told his aunt he had a fight with his girlfriend and she bit him. Then, he changed his story and says that the girlfriend cut his ear with a can opener. He didn't know where his accomplice went at this time. This was—

[36] Q. Was this in substance what he told you?

A. On the morning of the 11th, yes.

Q. Did there come a time when you called for a police stenographer to normally take this down?

A. Yes, I did.

Q. Do you know about what time this was?

A. That was about 10:20 A.M. on the 11th.

Q. Who was the police stenographer?

A. Sam Shadoff, on this one.

MR. BERGIN: Would you mark this, please?

(Whereupon People's Exhibit No. 2 was marked for identification: a statement.)

Q. Detective, will you tell us, after Mr. Shadoff arrived, what transpired; what did he do, what happened?

A. I had him identify himself as to age, name.

Q. Well, did you take a statement of him in the presence of Mr. Shadoff?

A. Yes, I did.

Q. Who was present at that time?

A. Well, it was Mr. Dunaway, myself and Sam Shadoff in the beginning.

Q. Did any other officers ask this defendant any questions?

A. Yes. Later on in the statement Detective-Lieutenant [37] Fantigrossi came in and asked him questions.

Q. All right. Do you recall about how long this took, to take this formal statement?

A. I'd have to say twenty minutes. I would just have to guess.

Q. All right. Detective, I show you People's Exhibit No. 2 marked for identification, and ask you if you will look at it?

A. Yes.

Q. You have had occasion to read this transcript over in preparation for this trial, Detective?

A. Yes, I did.

Q. Is this transcript I hand you now, is this the transcript of what was said by you and Mr. Dunaway that morning?

A. Yes, it was.

Q. Can you tell us now what time it was that this formal transcript ended?

A. Yes. It ended at 10:45 A.M.

Q. After 10:45 A.M. what happened?

A. Well, after 10:45 the blotters were made out and he was put in detention.

Q. Now, you have related to us the statement that he gave [38] to you orally before you called a stenographer in?

A. Yes.

Q. When the stenographer was present, did you go over the same material with him?

A. Yes.

Q. Is this, in sum or substance, the same as he said in front of the stenographer?

A. Yes.

Q. So, then, on that morning you did not see him after 10:45 A.M.?

A. Not on that morning, no.

Q. Did there come a time later on at any time when you had occasion to see Mr. Dunaway again?

A. Yes. It was the evening, around ten o'clock, on the 11th of August.

Q. Will you tell the Court what happened; what the reason for seeing him on that occasion was?

A. Called back into the building because Mr. Dunaway wanted to talk to myself and my partner. I went down to the cell block and put him in one of the smaller interview rooms there, and he told us that he wanted to come clean and tell the whole truth on it. So, I told him, "You have already been advised of your rights. [39] You remember those rights?" He says, "Yes." He says he knows them. He then gave us a verbal statement that he, Ronald Adams were over at 69 Lennox Street in a

girlfriend's house, and they discussed getting some money some place. They didn't know exactly where, yet, or anything. Ronald had the gun. They left the house. They walked over to the bridal shop on Genesee Street. They returned back to 69 Lennox Street, and they asked TJ Mosley to drive them down to Genesee Street, at which time Mr. Mosley did drive them, and Mr. Mosley parked at the Sportmen's Grill. He didn't know the name of the grill. He said the bar at the corner of Clifton and Genesee.

Q. Clifton?

A. Clifton and Genesee. Himself and Ronald got out of the car. They went back to the bridal shop. It was closed. Then, they went into the Tower of Pizza, and there it's just about the same thing.

Q. Did he relate again to you as to what happened inside?

A. Just about the same. Yes, went inside—he related about something—he stated when he left the store, he stated again he fell and injured his ear. They ran back to the car, which was still parked back there, got [40] into the car and were driven up to Atlantic Street where he then got off at his aunt's house.

Q. Now, this was a verbal statement he made to you in the detention area that evening of the 11th?

A. That's right.

Q. Was there anyone else present at that time?

A. Detective Dominick.

Q. What did you do after he told you that?

A. We told him we would see him again in the morning and discuss it further. We then left there and went in search of Adams and Mr. Mosley.

Q. You did not take a stenographic statement that evening?

A. No, I did not.

Q. Did there come a time when you did have that verbal statement taken stenographically?

A. Yes, we did.

Q. When was that?

A. That was the morning of the 12th, about 7:40 A.M.

Q. How was that done?

A. Well, we brought him back up in the interview room. At this time we had Paul Messina, Stenographer, come up and take it; and in sum and substance he told me the same thing he said the previous night.

[41] Q. This was in the presence of a stenographer Paul Messina?

A. That's right; yes.

MR. BERGIN: Would you mark this, please?

(Whereupon People's Exhibit No. 3 was marked for identification: a statement.)

MR. BERGIN: Would you mark these two pages also, please?

(Whereupon People's Exhibit No. 4 was marked for identification: two pages of sketches.)

Q. Detective, I show you Exhibit No. 4 marked for identification, two pages of sketches of some sort. I hand you those and ask you what they are?

A. Yes. These are drawings made by Mr. Dunaway as to the location of the crime, and the drawing is the interior of the pizza place.

Q. These were made by Mr. Dunaway in your presence?

A. Yes, they were.

Q. When were they made?

A. They were made the morning of the 11th of August.

Q. That is the morning when you had the first conversation with him?

A. That's true.

Q. Can you tell us was there any conversation about the [42] drawing of the sketches or how did it come about?

A. Yes. Have him describe the inside of the house, as to the location of the woman and Adams, and also the swinging doors in the back. This door and the cash register, as to his statement.

Q. Well, did you ask him to draw it out, or did he say he would draw it, or what happened?

A. No. I asked him if he could draw it, and he stated he would.

Q. He said he would?

A. Yes.

Q. And this is what he drew?

A. Yes.

Q. Now, there are two pages. Can you identify the first one with the Exhibit mark on it; what is that page, the first page?

A. Well, this is a drawing showing how—the direction he took after leaving the pizza place there down on Clifton, up Epworth to Atlantic Street. At this time he stated he was on foot, and he ran all this distance.

Q. This is a sketch that he drew?

A. That's right.

Q. And the second page is what, sir?

[43] A. It's a description, his drawing describing the interior of the pizza place.

Q. All right.

A. And it also describes—

Q. On the first page is there a gun there?

A. Yes. He made a drawing here of the gun, resembling the gun that was used.

Q. I hand you Exhibit No. 3 for identification, and ask you if you recognize this?

A. Yes.

Q. Do you recognize that transcript, detective?

A. Yes.

Q. What is that a transcript of?

A. This is a transcript that was taken on the morning of the 12th, by Paul Messina, the stenographer.

Q. You have had a chance to read this over?

A. Yes, I did.

Q. Does this contain stenographically what he told you verbally the night before in the detention area?

A. Yes.

Q. On the times, would you tell us what time this stenographic statement started?

A. It started at 7:41 A.M. on the 12th.

[44] Q. How long did it take? When did it end?

A. It ended at 8:06.

Q. After 8:06, did you have anything further to do with Mr. Dunaway; any further conversation with him?

A. No. We then returned him back to the cell block.

Q. So, have you related, sir, everything this defendant has told you about the occurrence of this crime?

A. He did state—I don't remember just when it was, but he did state he wanted to give himself up shortly after the crime was committed, but he was threatened that if he did so—he was threatened about bodily harm.

Q. When was this, detective?

A. I don't recall whether it was the night in the cell block or the return to his cell block after the second statement. I just don't recall when it was.

Q. Now, during your interviews with this defendant, and they consisted of three; is that correct?

A. Yes.

Q. Did you or any other officers physically abuse the defendant in any way?

A. None whatsoever.

Q. Was there any force or pressure, coercive means used at [45] all by you or any other members of the Police Bureau?

A. No, there wasn't.

Q. Detective, would you identify here in court the person that you called Mr. Dunaway, if you do see him here?

A. Yes. He's sitting here with the gray double breasted suit on at the table there.

Q. Can you tell us where he is in relationship to Mr. Crimi?

A. Yes. He's to Mr. Crimi's immediate left.

Q. Mr. Crimi's left?

A. Yes.

Q. Or right?

A. I'm sorry; right.

MR. BERGIN: Thank you, detective. You may ask.

CROSS-EXAMINATION

BY MR. CRIMI:

Q. Detective Novitskey, I believe you stated that Sam Shadoff came and took a statement at about 10:20 on August 11, 1971; is that correct?

A. Yes, I did.

Q. How long before 10:20 had you called for Sam Shadoff?

A. I don't remember. I have no idea.

Q. Was he on duty in the building that day?

A. He should have been, yes.

[46] Q. I think you said that it was approximately nine o'clock in the morning, that same morning, that Irving Dunaway was brought to you; isn't that correct?

A. Yes.

Q. So, that you had occasion to speak to him from approximately nine o'clock until 10:20, 10:15; is that correct?

A. That's correct.

Q. So, that your conversation with him then lasted for that length of time; is that correct?

A. That's correct.

Q. Now, I want to show you People's Exhibit No. 1. You tell me this was the waiver card that the Police Department uses; is that correct?

A. That's correct, sir.

Q. Now, is there anything on that card, on either side thereof, that is in the handwriting of Irving Dunaway?

A. No, there isn't.

Q. That card—whose handwriting is it on that card?

A. Mine and Sal Ruvio's signature, and also there's a notation here by Detective Dominick.

Q. Is there anything on that card that states the time that you read those—the card to Mr. Dunaway?

A. Yes, there is.

[47] Q. All right. But, that was written in; is that correct?

A. That's right.

Q. Is that your handwriting of the time?

A. That's right.

Q. I notice here it has a note, 7:40 A.M. 8-12, in pencil. What does that mean?

A. Detective Dominick put that note on there on the 12th of August, when we proceeded to take another statement from him.

Q. Now, it is your testimony that at 9:00 A.M. on 8-11-71, you read what was on this card to Irving Dunaway?

A. I give it to him verbally, but I had the rights with me present.

Q. Did you read the card?

A. No, I didn't.

Q. Oh, you did not read from the card?

A. No, I didn't.

Q. So, on the card, where it says, "Do you understand what I have just told you," and it says response, "Yes," that is your handwriting?

A. Yes.

Q. But, as a practical matter, that particular question does not answer what is on this card, but what you told [48] him verbally; is that correct?

A. Which is verbatim with the card.

Q. Which is verbatim with the card?

A. Yes.

Q. You have got this memorized, have you?

A. Oh, yes.

Q. All right. Would you please tell me now what this card says?

A. That you have a right to remain silent.

Q. Well, no, you had it memorized?

A. Yes.

Q. Well, then, read it to me verbatim?

A. "I am now advising you that you have a right to —"

THE COURT: You do not mean to read it, do you?

MR. BERGIN: I object.

Q. I am sorry, give it to me—

A. I am now advising you that you have a right—

MR. BERGIN: I object, Your Honor. The witness has testified what he advised the defendant in his direct-examination. I object to his being asked whether he memorized that card verbatim and to give it back to him verbatim. What is an issue is actually what the defendant [49] was told.

THE COURT: There is no question that is an issue, but this may have some effect upon the credibility of the witness. Overruled.

A. I am now advising you that you have a right to remain silent. You do not have to answer any questions if you do not want to; that anything you do say would be used against you in a court of law; that you have a right to consult with an attorney before answering any questions and to have an attorney present with you during the questioning by me if you so desire. If you can't afford an attorney, one will be provided for you. If you do consent and agree to discuss this matter without an attorney present, you can terminate the discussion at any time. I then asked him—

Q. All right. Is that the exact speed at which you were—

A. No, definitely not.

Q. You were slower?

A. Yes.

THE COURT: Is that what is on the card, Mr. Crimi?

MR. CRIMI: Basically it is, yes, Your Honor. There are some small variations.

[50] Q. All right. Now, Detective Novitskey, you have been on the force for twenty years; is that correct?

A. Yes, sir.

Q. And I have assumed you have used, since at least 1964 or so, these cards; isn't that correct?

A. Whenever they came out, yes.

Q. Whenever they came out. I will pick '64.

A. Yes.

Q. Now, haven't you had occasions where you have had defendants initial the card?

A. I have, but very seldom.

Q. But, at any rate you did not ask Mr. Dunaway to initial this card?

A. No, I did not.

Q. Did you do anything other than tell him what these—tell him about these rights to an attorney; did you attempt to explain anything on the card?

A. No. I asked him if he knew what the rights meant. He stated he did.

Q. That is the only question you asked him, "Do you know what they mean," and he said, "Yes."

A. I asked him then if he would agree to waive the rights and consent to discuss the matter with us, and he [51] stated yes.

Q. Did you try to explain what waive meant or agreed meant?

A. No, I did not.

Q. Then, after you did that, then, you began talking to him, I take it?

A. That's right.

Q. You had not talked to him about the crime prior to that, had you, prior to the rights?

A. No.

Q. Now, this was August 11, 1971, and the crime took place in March of that year; is that correct?

A. That's true.

Q. Did you find, in talking to him, that he was vague as to dates and times and places?

A. Yes, he did not know the date.

Q. Did you do anything to refresh his recollection?

A. Well, I asked him if he remembered what month. He says it was in March. I asked him what day. He says a Friday. I asked him which Friday. He says the last Friday in March. That was about the extent of the date.

Q. Well, did you give him any kind of a synopsis prior to questioning him to refresh his recollection as to what you were after and what you were going to discuss about [52] it, or did you immediately start asking him questions?

A. No. I asked him about—well, I told him we were going to talk about the murder at the Genesee Pizza

Shop, and I asked him if he knew anything about it. He said yes. Then, he was advised, and we went to it from there.

Q. Well, I take it from what you have just said now, that you advised him after he said yes?

A. Yes.

Q. So, that there was a sentence or two prior to the advisement of the conversation; is that correct?

A. Well, yes. We have to let him know we are going to talk about it, so he can know whether to waive his rights.

Q. Well, I just wanted to make one thing clear, that the first thing you did was not advised him of his rights; you talked to him and you told him that you wanted to talk to him about the pizza parlor murder and did he know anything about it, and he said yes, and then you advised him of his rights?

A. That's correct.

Q. Now, Exhibit 4 is apparently two diagrams. Can you tell us approximately when these were drawn; in the beginning [53] of the conversation that you had or toward the end?

A. It was during the conversation before the statement was taken.

Q. This occurred during the oral conversation?

A. Yes.

Q. Were you having some difficulty understanding what Dunaway was saying; that he tried to clear it up by diagram or what?

A. Well, yes. After I said something to myself—when he told me he hit the pizza place and ran down a certain street—but, the other streets I'm not too familiar with them—and he drove up this—

Q. You weren't familiar?

A. Not with some of them, Atlantic and some others.

Q. Now, after the first stenographic statement was concluded, I take it you testified he was booked and that he was put in a cell; is that right?

A. Yes.

Q. In the detention area?

A. Right.

Q. You say then that ten or eleven o'clock that very night, that you got a message that he wanted to talk to you?

A. That's true, yes.

[54] Q. And you went up there and saw him at that time?

A. Yes.

Q. Did you readvise him of his rights at that time?

A. At that time I told him—well, I asked him, "Do you remember your rights, what I read to you this morning?" He said, "Yes." And he says he wanted to clear up his story; he wanted to tell the truth.

Q. All right. How long did that oral conversation take place?

A. It wasn't—I'll have to guess, but it was a very short time; five to ten minutes.

Q. Then, you came back in the morning with a different stenographer Mr. Messina; is that correct?

A. Yes.

Q. Did you make any notes concerning this transaction?

A. I made a supplement—my partner made a supplement out.

Q. Do you have that with you?

A. No, I do not.

MR. CRIMI: Do you have that, Mr. Bergin?

MR. BERGIN: Detective Dominick's report?

MR. CRIMI: Well, he did not make a report at all.

THE WITNESS: No, my partner made it.

[55] MR. CRIMI: Are you going to call Detective Dominick to the stand?

MR. BERGIN: Yes.

Q. Did you testify before the Grand Jury?

A. I don't remember.

MR. BERGIN: I think he did. Yes, Detective Novitsky did testify before the Grand Jury.

MR. CRIMI: May I have a moment, Your Honor, please?

THE COURT: Yes.

(Whereupon Mr. Crimi had a moment.)

Q. I am going back to Exhibit 1. Was this made in the presence of Mr. Dunaway, written out, handwritten?

A. Yes. Well, I was stating his rights and I was filling in, yes.

Q. So, he was in a position to see you writing this out?

A. Yes.

MR. CRIMI: I have no further questions.

MR. DONOVAN: No questions, Your Honor.

MR. BERGIN: I have no further questions.

THE COURT: Thank you, detective. You may step down.

(Witness excused.)

[56] MR. BERGIN: The People call Detective Dominick.

JOSEPH DOMINICK, Detective with the Rochester Police Bureau, called herein as a witness on behalf of the People of the State of New York, having first been duly sworn was examined and testified as follows:

DIRECT-EXAMINATION

BY MR. BERGIN:

Q. Detective, you are with the Rochester Police Bureau?

A. Yes, sir.

Q. You work with Detective Frank Novitskey on many cases?

A. Yes, sir.

Q. Did there come a time last summer, the month of August, when you had occasion to see the Defendant Irving Jerome Dunaway?

A. Yes, sir.

Q. Can you tell the Court when it was that you first came in contact with Mr. Dunaway?

A. It would be on August 11, 1971, at approximately 9:00 A.M.

Q. Where was that?

A. At the Public Safety Building, sir.

Q. Can you tell us what happened at that time?

A. He was under arrest at the time, sir, and I recall that [57] my partner, Frank Novitskey, was at the Public Safety Building and did question him that morning.

Q. Were you in on any of the interviewing at that time?

A. Not that day, no, sir.

Q. Were you present later on? We understand that Mr. Dunaway called and was seen again later that night. Were you present with Detective Novitskey, then?

A. Yes, sir.

Q. Can you tell us how that came about and what your recollection is as to what happened that evening?

A. Well, it was about 10:00 P.M. on August 11, 1971. We received word that Irving Dunaway was in custody at that time and wanted to talk to some detectives. I recall that my partner Frank Novitskey and I did go to the cell block to talk to Mr. Dunaway. He stated that he had lied about a statement that he had made to Detective Novitskey, and he wanted to clear some matters up.

Q. Do you recall what he said at this time?

A. I recall that he mentioned he had lied about it, and that there was also a third party involved by the name of TJ Mosley. We talked to him for a short time, and then we went about our way attempting to locate Mr. Mosley and one Ronald Adams.

[58] Q. Did there come a time when you reduced this conversation to a stenographic transcript?

A. Yes, sir.

Q. When did that happen?

A. About 7:40 A.M. on August 12, 1971. That was in the Public Safety Building.

Q. That was the next morning after you talked with Dunaway?

A. The morning after, yes, sir.

Q. Who questioned Mr. Dunaway at that time?

A. Detective Novitskey, sir.

Q. Do you recall at this time what Mr. Dunaway said on that morning of the 12th?

A. He stated that he was at home on Lennox Street. I believe it was 69 Lennox Street, on Friday, the 26th of March, 1971. He was with a fellow he called "Bay-Bay," which would be Ronald Adams, TJ Mosley, and one Henry Jones; that he and "Bay-Bay" had talked about getting some money. They had discussed a robbery. He said he recalled that they walked down Genesee Street toward Main going to the bridal shop on Genesee Street. He recalled that "Bay-Bay" had a shotgun underneath his coat. He said that he arrived at the bridal shop. I don't recall the reason, but they turned around and went [59] back to Lennox Street. He said then they got TJ Mosley to drive them down to Genesee Street. He says they were left off by Clifton, I believe—by Clifton Street, and then they looked into the bridal shop and it was closed at this time. Being around 10:00 P.M., then they walked into the—they noticed a pizza parlor that was open on Genesee Street, and they decided to go there, to hold it up; and he stated upon entering the pizza shop he recalls seeing a woman there, and she yelled out to someone in the back room, "A man's got a gun." He says he walked over to the cash register. Then, he heard a shot. He says both of them ran from the pizza parlor, he and "Bay-Bay," and as I recall he fell upon making an exit, on the door I believe, and he hurt his ear. He says then they went to a parking lot next to the Sportmen's Grill on Genesee and Clifton, got into a car, and with TJ Mosley they went back to Lennox Street. But, Irving Dunaway said that he didn't go to 69; that he went to his aunt's home, which I believe it was 26 Lennox Street, and that later—he stated also, that he recalled his aunt mentioning something about his ear. I believe he said he hurt it with a can opener or something to this effect. Then, he went back to 69 [60] Lennox Street and he had a short conversation with "Bay-Bay" or Ronald Adams.

Q. Now, did you see Mr. Dunaway after the morning of the 12th of August, when this stenographic statement was taken? Did you have any conversation with him after that?

A. I don't recall, sir.

Q. Did you or any police official or anyone use any force or pressures on Dunaway to make a statement?

A. None whatsoever, sir, no.

MR. BERGIN: That is all I have. You may examine.

CROSS-EXAMINATION

BY MR. CRIMI:

Q. Detective Dominick, I think you testified it was about nine o'clock in the morning that you saw Mr. Dunaway for the first time; is that correct?

A. Yes, sir.

Q. August 11th?

A. Yes, sir.

Q. Where did you see him?

A. He was at the Public Safety Building, sir, Police Headquarters.

[61] Q. Police Headquarters?

A. Yes.

Q. Did you talk to him at all on that morning?

A. No, sir.

Q. You merely saw him in police headquarters on the fourth floor, I take it?

A. Yes, sir.

Q. You saw him in the interrogation room or where?

A. No, in the hallway, sir.

Q. You had nothing to do with his being talked to by Novitskey, your partner?

A. No, sir.

Q. So, the first opportunity that you had to talk to Mr. Dunaway was at about ten o'clock that night; is that correct?

A. Yes, sir.

Q. You went there because you had gotten a message that he wanted to talk to you?

A. Yes, sir.

Q. Did you at any time that night when you talked to him, did you advise him of any rights, so-called?

A. Detective Novitskey did.

Q. In your presence?

[62] A. Yes, sir.

Q. This was approximately ten o'clock?

A. Yes, sir.

Q. That night; is that right?

A. Yes.

Q. Did he advise him from a card, or did he—

A. I believe it was verbally, sir.

Q. Verbally?

A. Yes, sir.

Q. He gave him all of the rights that you are familiar with yourself?

A. Yes, sir.

Q. The right to an attorney, et cetera?

A. Yes, sir.

Q. Now, Detective Dominick, there is about three or four rights, is there not, that you advise people of?

A. No, sir.

Q. Well, you advise them of the right to an attorney; the right to remain silent?

A. Oh, yes, sir.

Q. Isn't that correct?

A. Yes, sir.

Q. So, at ten o'clock that night Detective Novitskey [63] advised him of each of those rights; isn't that correct?

A. Yes, sir.

Q. You had nothing—strike that. Then, at seven o'clock—how long was this conversation at ten o'clock?

A. It wasn't long, sir. I don't think it was five minutes.

Q. Then, you saw Mr. Dunaway again in the morning; is that correct?

A. Yes, sir.

Q. When you saw him in the morning, was there any conversation with him prior to the stenographer coming there, or was it all simultaneous?

A. I don't recall, sir.

Q. You do not recall?

A. No.

Q. At that time did you readvise him of his rights?

A. I would have to say it was Detective Novitskey, sir.

Q. Did you make any report or notes as to your activity concerning what you have testified to today, a supplemental report or anything?

A. Well, there were many supplemental reports filed in this particular case, but I don't recall any about what I have just testified to, no.

Q. There was no report made by you concerning what you have [64] testified to today; is that correct?

A. I don't recall any, sir, no.

MR. CRIMI: Well, Your Honor, I think Detective Novitskey said that he did make a report.

THE COURT: The officer's testimony, I think, is controlling.

MR. CRIMI: Well, if there is—

THE COURT: Officer Novitskey, according to my recollection, was not sure whether any report was made. You may ask again, if you wish, to try to refresh your recollection.

Q. It is your testimony that you did not or you do not recall making a report?

A. I honestly don't recall, sir.

Q. You could have made a report?

A. It is possible, yes.

MR. CRIMI: Well, I think in this posture, Your Honor, I think if the District Attorney has the report he should allow me to look at it for purposes of cross-examination.

THE COURT: If he has it, he will furnish it.

MR. BERGIN: I have a report here, Your Honor. I do not know if it is this officer's or not. [65] It appears to be.

May I identify this myself first with him to see whether it is?

THE COURT: Yes.

PRELIMINARY EXAMINATION

BY MR. BERGIN:

Q. Detective Dominick, is this your report?

A. Yes, sir.

MR. BERGIN: Your Honor, I will object. I would like to show the report to the Court. I would object to just giving this to Defense counsel at this time. It contains a lot of other material. It contains the names of witnesses and other investigative work that this officer did not testify to.

THE COURT: I suppose the testimony in this case is somewhat limited to the voluntariness of an alleged confession; isn't it, Mr. Crimi?

MR. CRIMI: I am sorry, Your Honor, I did not hear you.

THE COURT: Any testimony in this hearing is limited to the voluntariness of any alleged confession. It does not include the testimony [66] as to the commission of the alleged crime itself.

MR. CRIMI: That is right.

THE COURT: Well, if this report has nothing to do with this statement, any statement that was made in the detective's presence, I cannot see where it is relevant at this time.

MR. CRIMI: Well, I do not understand District Attorney to say that there is nothing in there.

MR. BERGIN: No, I didn't say that. Maybe I should make myself more clear.

There is material in this report concerning the apprehension of Mr. Dunaway and some things that have been testified to, but there is an awful lot of other matters in here that has no part of this hearing.

MR. CRIMI: Is it severable?

THE COURT: I will rule that anything that is germane to this hearing or to the purpose for which it is had may be examined by defense counsel at this time.

MR. BERGIN: All right. Your Honor, I will [67] give Mr. Crimi the report, and I know he will just refer to the reports that are germane to this hearing.

MR. CRIMI: All right.

CROSS-EXAMINATION

BY MR. CRIMI CONTINUED:

Q. Did you testify before the Grand Jury?

A. I'm quite sure I did, sir. Yes.

MR. BERGIN: No, he did not.

MR. CRIMI: Just a minute, Your Honor.

THE COURT: Yes.

(Whereupon Mr. Crimi had a moment.)

MR. CRIMI: I have no further questions, Your Honor.

MR. DONOVAN: Before I decide, I would like to see the statement myself, Your Honor.

THE COURT: Yes.

(Whereupon Mr. Donovan reviewed the statement.)

MR. BERGIN: If Your Honor please, I object to Mr. Donovan reviewing all the report, and I know he will do it in the nature of Mr. Crimi. The first part of this report refers to the testimony in this hearing.

[68] THE COURT: Well, inasmuch as the report is not severable, I rule that Mr. Donovan, representing Mr. Mosley, has a right to examine the report as it concerns the matters testified to in this hearing.

MR. BERGIN: Thank you, Your Honor.

MR. DONOVAN: I have no questions.

MR. BERGIN: I have no further questions.

* * * *

[75] MR. CRIMI: Your Honor, at this time I move that the Court order excluded and stricken from the record any and all testimony relating to the alleged admissions and/or confessions made by the Defendant Irving Dunaway, as testified to by two detectives, two or three [76] detectives in this hearing, on the grounds that such admissions and/or confessions are made without the proper advice of counsel, and I am referring to those constitutional rights which were spelled out in *Miranda versus Arizona*, a Supreme Court case, and a waiver of those rights as spelled out both in the case of

Miranda versus Arizona and in the case of *Johnson versus Zerbst*, also a Supreme Court case; and the latter case stands for the proposition that before there can be a valid waiver of any constitutional rights, there has to be, on the part of the person waiving it, an intelligent and understanding waiver of these rights, and a waiver which is consonant to an understanding of the rights and what he has given up.

The testimony in this particular hearing indicates that verbally at about nine o'clock when the defendant was at Police Headquarters and in an interrogation room, in a police atmosphere, he was verbally asked—or advised, I should say, of his rights to [77] remain silent; and that he did not have to answer any questions, and his right to have an attorney, et cetera, as testified to by Detective Novitskey; and Detective Novitskey then said that he asked him, he asked the defendant whether he understood him, and the defendant said, "Yes," and then he asked the defendant, "Do you agree to waive these rights and consent to us talking to you," and the defendant allegedly said, "Yes."

I say that in looking at this Exhibit which is in evidence and which contains many, or I should say several very fundamental constitutional rights, which speak of self-incrimination, which speak of the right to an attorney, which speak of the right to an attorney in the event that you cannot afford one, and also which more importantly talks about a waiver of such rights, that just the mere asking in a police atmosphere and in an interrogation room, just the mere asking is—"Do you understand these," and "Did you agree to waive these rights," [78] is not a sufficient showing that that individual understands what his rights as a citizen were, understands the consequence involved and understands what it meant to waive these rights.

As part of the motion, then, I contend that there not being sufficient evidence of an understanding, an intelligent waiver of these rights, assuming that the rights were read or given to him at the time that the detective testified, which we must assume, because that is the state of the evidence at this point. Assuming that, I say

that there is not sufficient proof of an intelligent waiver and understanding of these rights, and if the Court were to agree with me, that it would seem to me that this would become a primary illegality, which would then effect the subsequent testimony as to Exhibit 2 and 3 in evidence.

I have a further motion that deals with the suppression of the evidence, and the basis of that is that the testimony, to this [79] point, indicates that on August 11th at approximately seven—strike that out—at approximately 8:30 in the morning the three detectives left in a police car, went to the defendant's residence on Broad Street. One detective stationed himself in a driveway, admittedly to watch and see whether there was any situation that might arise that the person whom they were looking for might try to get away, and I think one detective went to the front door and one detective was in the car. Subsequently they walked to another home where the detective also positioned himself in the driveway and one went up to the front door, and then the three left, including the defendant, in a car and brought down to headquarters.

I think that those facts specify custody, and that in effect, at that particular point, the defendant was under arrest. He had lost his freedom of movement as defined in the Miranda versus Arizona case; and furthermore, there is testimony by Detective Dominick [80] that when he had seen the defendant, it was nine o'clock and the defendant was under arrest; and further, there is testimony that these rights were not read or at least not told to the defendant until after the defendant had admitted that he knew something about the incident in which they wanted to question him on.

I, therefore, say that the custody and the questioning besides my contention that they followed, they were followed by an unintelligible waiver of the rights, and also taken a period of custody for which there was and has not been established any probable cause to hold the defendant for any questioning whatsoever. That comes under the case of—

THE COURT: A Supreme Court case?

MR. CRIMI: It is a Supreme Court case. It started in New York. It begins with an M. I can supply the Court with that case.

THE COURT: It is a Supreme Court case?

MR. CRIMI: It is a Supreme Court case.

THE COURT: I do not know what it is.

[81] MR. CRIMI: It begins with an M, and I confuse it with Miranda. Morales versus New York. That case held that any questioning during the period which the defendant was in custody without there being probable cause vitiates any questioning or any statement taken during that time.

THE COURT: Your motion, in all respects, is denied.

MR. CRIMI: Exception, Your Honor.

THE COURT: On your motions.

MR. CRIMI: Exception, Your Honor.

THE COURT: Have you anything, Mr. Donovan?

MR. DONOVAN: Nothing, Your Honor.

MR. CRIMI: The defendant wishes to testify.

IRVING JEROME DUNAWAY, Defendant, called herein as a witness on behalf of himself, having first been duly sworn, was examined and testified as follows:

DIRECT-EXAMINATION

BY MR. CRIMI:

Q. Would you kindly state your name, please?

A. Irving Jerome Dunaway.

Q. Mr. Dunaway, would you please speak as loudly as you [82] possibly can. Are you the defendant in this case?

A. Yes.

Q. How old are you now?

A. Nineteen.

Q. When were you born?

A. November 28, 1952.

Q. Did you graduate from high school?

A. No, I didn't.

Q. How far did you go in school?

A. To the 10th grade.

Q. When did you finish the 10th grade?

A. 1969.

Q. Now, did there come a time on August 11, 1971, at approximately 8:30 in the morning that you saw some policemen?

A. Yes.

Q. Can you tell us where you were at that time?

A. I was at a friend's house, 102 Walnut Street.

Q. Tell us what happened at that time and place?

A. About eight o'clock my sister came over. She told me that the police were at my house on Broad Street. She said they wanted to question me about something. So, I opened the door to go home on Broad Street.

[83] Q. All right. Where do you live?

A. 865 Broad Street.

Q. How far is 865 Broad Street from that Walnut Street address that you were on?

A. About a half a block.

Q. Your sister had come over to Walnut Street and brought that message to you?

A. Yes.

Q. After she had given you that message, you then did what, if anything?

A. I was leaving to go to my house on Broad Street.

Q. All right. Well, then, tell us what happened as you were leaving?

A. As I walked out the door there was a detective at the bottom of the steps. As I came down the steps he grabbed me by the arm, and he called another detective from the rear of the house. The other detective came and he got me by the belt of the pants, and then we started walking toward Broad Street. When we got around to Broad Street there was another detective in the cleaner's next door on the telephone. They called, and then they put me in a car and we left.

Q. All right. At the time that you came out of the door, [84] can you tell us whether or not the detective

asked you who you were, or any conversation whatsoever?

A. No. We just told the other detective—he just said, "I got him."

Q. All right. Now, then, you eventually got in the car?

A. Yes.

Q. Do you recall where you were sitting in the car?

A. In the back seat.

Q. Was there anybody else sitting with you in the back seat?

A. There was one detective in the back seat.

Q. Now, these two detectives that you have talked about, did you see him here testifying today?

A. Yes.

Q. You did?

A. Yes.

Q. Once you got into the car, where did you go, if anywhere?

A. To the Detective Bureau, Civic Center.

Q. Now, was there any conversation in the car concerning what they wanted to talk to you about or any conversation about anything?

A. No. I only asked them why they wanted to talk to me.

Q. What did they say?

[85] A. Nothing.

Q. So, they did not converse with you the facts of this case?

A. No.

Q. All right. Have you any recollection about what time it was when you got to the police headquarters?

A. About twenty or quarter of nine, or nine o'clock.

Q. Do you know where they took you?

A. They took me to a room in the Detective Bureau.

Q. All right. Now, the two detectives that picked you up, were they ever in that room with you?

A. I don't remember.

Q. Who was in the room with you, if anyone?

A. At first they put me in a room and they left. Then, another—I think it was a lieutenant came.

Q. Did he talk to you at all?

A. Well, he told me—first, he asked me did I know a Ronald Adams, and then he asked me do I know a Hubert Johnson. Then, he told me that he had got some information from Hubert Johnson that I and Ronald Adams were in the pizza parlor on Genesee Street.

Q. All right. This was a lieutenant, was he?

A. I think it was a lieutenant.

[86] Q. Was it anybody that testified here today?

A. Yes.

Q. Well, which one of the fellows that testified today was it?

A. The third one.

Q. The white-haired fellow?

A. Yes.

Q. All right. Now, before he—strike that out. When did he, if he did, advise you of your right to have an attorney, your right to have an attorney if you could not afford an attorney, of your right to remain silent, of your right to know that anything you said, would be held against you? When did he advise you of those rights?

A. Just before he got ready to take the statement.

Q. Now, when you say got ready to take the statement, what do you mean by that?

A. When the man came in with the shorthand, that wrist shorthand.

Q. So, that up to the time to just before the man came to take the statement, you say you were not advised of any of the rights; is that correct?

A. Yes.

[87] Q. Now, how long was it from the time that you go to headquarters to the time that the man came down to take the statement?

A. Between forty-five minutes and an hour, I'd say.

Q. During that time were you talking to the detectives?

A. Yes.

Q. How many people were in there, the one person that you were talking to or more than one?

A. I think it was three.

Q. Three?

A. Yes.

Q. You were talking to these people while you were there?

A. Yes.

Q. During that time did you draw these diagrams?

A. Yes.

Q. Now, you drew these diagrams before you were told about your various rights; is that correct?

A. Yes.

Q. During that time did anybody threaten or abuse you or beat you or anything like that, Irving?

A. No.

Q. Your answer is no; is that correct?

A. No.

[88] Q. I want to show you in this Exhibit 1, and outside of today, when was the first time that you saw this, if you did, this particular Exhibit?

A. The morning after my arrest.

Q. That would be August 12th?

A. Yes.

Q. About what time, if you can recall, did a stenographer or the man who came to take the statement, about what time was it?

A. It was after ten o'clock.

Q. After ten o'clock?

A. Yes.

Q. When that man came down, then, what if anything was said or done in relation to your rights?

A. I was told my rights, then, after we came down.

Q. All right. After you were told your rights, then, they started asking you questions again?

A. Yes.

Q. Now, Irving, is that the first time you were told your rights from the time you were picked up at 8:30 that morning?

A. Yes.

Q. Then, you did discuss and answer questions, and the [89] man took them down; is that right?

A. Yes.

Q. Later on that day did there come a time that you saw the detectives again?

A. Yes.

Q. About what time was that?

A. It was at night. I'm not sure what time it was.

Q. What occurred then, if anything?

A. The detective asked me if I know where they could find a Ronald Adams.

Q. Now, how many detectives were there at that time?

A. Two.

Q. Two?

A. Yes.

Q. Did you see them here today in court?

A. Yes.

Q. You do not know their names, do you?

A. No.

Q. Would it refresh your recollection if I said the third and fourth detective?

A. Yes.

Q. That testified here?

A. Yes.

[90] Q. Now, before they started to talk to you at that time, did they say anything about your rights or remind you of your rights or anything?

A. No.

Q. How long did you talk to them that night?

A. About twenty-five or ten minutes.

Q. Can you tell us whether or not you had requested them to come and see you that night?

A. I don't know.

Q. You don't remember?

A. No.

Q. When did you see them again, if any?

A. After that night?

Q. Yes.

A. The next morning.

Q. Where was that?

A. Well, one detective came upstairs and got me from the city lockup.

Q. Where did you go?

A. To the detective bureau.

Q. What happened when you got there?

A. He told me that he wanted to take another statement.

Q. All right. Before they took that statement from you, [91] did they say anything to you about your rights?

A. Yes. He told me my rights.

Q. And the stenographer was present at that time?

A. Yes.

Q. You did then answer questions; is that correct?

A. Yes.

Q. Well, on the two occasions prior to the questioning of the statements that you were told your rights, can you tell us whether or not you understood what was said to you and what you were waiving? Did you understand what they were telling you?

A. I really didn't understand.

Q. Had you ever been questioned by police before in your life?

A. No.

Q. Have you ever been in an interrogation room before?

A. No.

Q. Now, throughout all of this—strike that out. All these times that you talked to the detectives, did they at any time hit you or physically abuse you at all?

A. No.

MR. CRIMI: That is all. You may examine.

[92] CROSS-EXAMINATION

BY MR. BERGIN:

Q. Mr. Dunaway, you have gone to the 10th grade in Rochester; is that right?

A. Yes.

Q. Your education?

A. Yes.

- Q. That was at Madison High School?
 A. Yes.
 Q. Where did you go to school before Madison?
 A. Number 30 School.
 Q. Is that in the City of Rochester?
 A. Yes.
 Q. How long had you lived in Rochester? Were you born in Rochester?
 A. Yes.
 Q. You attended schools in the Rochester City District?
 A. Yes.
 Q. Throughout your ten years of schooling?
 A. Yes.
 Q. Where was the primary school? You gave me a number. Where was that located; in the City?
 A. I think it was Otis Street.
 Q. How many grades did you go there?
 [93] A. I finished the 6th grade.
 Q. Then, where did you go?
 A. Madison.
 Q. Did you go to Junior High School at Madison, then?
 A. Yes.
 Q. Then to the regular high school after junior; is that right?
 A. Yes.
 Q. What did you do after you left school?
 A. I went to Job Corps.
 Q. To the Job Corps?
 A. Yes.
 Q. Did you work there?
 A. Yes.
 Q. What type of work did you do there?
 A. Electronics.
 Q. Electronics?
 A. Yes.
 Q. Did you work for an employer, for some company, or what?
 A. No, it was like a school.

- Q. Where is that located?
 A. I was at a camp in Edison, New Jersey. I was transferred from there to Indianapolis.
 [94] Q. What did you study in Edison, New Jersey?
 A. Electronics.
 Q. From there you went to Indiana?
 A. Yes.
 Q. What did you study there?
 A. Electronics.
 Q. When did you leave Indiana?
 A. I can't remember, but I stayed in Job Corps for six months.
 Q. Where did you go from Indiana, from your work there?
 A. Back home.
 Q. Back to Rochester?
 A. Yes.
 Q. Did you work here back in Rochester when you came back or not?
 A. Not as soon as I got back.
 Q. But, did you obtain employment sometime later?
 A. Yes.
 Q. Where did you work then?
 A. I think it was the Farm Metal Division.
 Q. What?
 A. Farm Metal Division.
 Q. Metal Division?
 [95] A. Yes.
 Q. Who was at 102 Walnut Street? You said there was a friend who lived there?
 A. A friend of the family's, yes.
 Q. That is where you were arrested?
 A. Yes.
 Q. You say the police officers did not say anything to you at all; they just grabbed a hold of you and took you in?
 A. Well, after the first one grabbed my arm, he told the other one, "I got him." That was all he said.
 Q. Had you ever met these officers before?
 A. No.

- Q. They didn't ask you who you were?
 A. No.
 Q. Is there any way they would have known who you were?
 A. I'm not sure.
 Q. You say they didn't ask you who you were?
 A. No.
 Q. You heard the detectives say here this morning, "Are you Mr. Dunaway," and he said, "Yes." Do you deny that?
 A. Pardon me?
 Q. You deny that you indicated your name to them?
 [96] A. I don't remember.
 Q. You don't remember what?
 A. Telling them my name.
 Q. You don't remember telling the detectives your name?
 A. No.
 Q. You don't think they just pick up anybody without knowing who the person was if they didn't have a name.
 A. They—
 Q. Pardon?
 A. I don't remember—I don't remember telling nobody.
 Q. You don't know?
 A. I don't remember.
 Q. What time was it that they came to this address and took you in?
 A. About eight o'clock.
 Q. You have heard the detectives testify to the various times involved here. Were the detectives correct in their times?
 A. I don't—
 Q. The times that the officers gave you, is that your memory of the times when you were arrested, taken downtown and gave these various statements?
 A. No.
 [97] Q. What?
 A. Would you repeat that, please?

- Q. All right. You said they came and got you about eight o'clock?
 A. Yes.
 Q. Then, you were taken right downtown?
 A. Yes.
 Q. And at nine o'clock Detective Novitskey started talking to you; is that right?
 A. Yes.
 Q. Then, a stenographer came later on and you were talked to in the presence of the stenographer; is that right?
 A. Yes.
 Q. How long were you there before the stenographer came?
 A. Hour and forty-five minutes.
 Q. Are these diagrams that you were shown here, you yourself drew those diagrams?
 A. Yes.
 Q. Were you told what to draw or anything?
 A. I was told to draw it.
 Q. You were asked to draw a diagram, but you provided the information on the diagram; is that true?
 A. Yes.
 [98] Q. Now, the evening of your arrest on August 11th, you were talked to again in the detention area by the detectives; is that right? They came up and talked to you again?
 A. Yes.
 Q. Did you ask someone in the jail there that you wanted to say something further to the detectives?
 A. I don't remember asking him.
 Q. You do not remember that?
 A. No.
 Q. Then, it is possible that you may have asked to see the police again?
 A. Yes.
 Q. You are not denying that?
 A. No.
 Q. These statements that the police testified to, you gave these statements voluntarily to the police; did you?
 A. Yes.

MR. BERGIN: Thank you, sir.

MR. CRIMI: That is all.

MR. DONOVAN: I have no cross.

THE COURT: You may step down.

(Defendant excused.)

MR. CRIMI: I do not have any other witnesses, [99] Your Honor.

THE COURT: Any witnesses, Mr. Donovan?

MR. DONOVAN: No, Your Honor.

THE COURT: Any rebuttal, Mr. Bergin?

MR. BERGIN: No, Your Honor.

THE COURT: The proofs are closed.

MR. CRIMI: Your Honor, I repeat each and every motion that I made at the end of the Prosecution's presentation on this hearing, and renew the same with the same force and effect, and with the added advisement that the defendant has now testified and he has testified that he was not advised of his rights until shortly prior to the taking of the stenographic transcript or stenographer statement; and also that he did not comprehend fully the rights or the waiver of the rights as said to him when they were said to him prior to the transcript being taken.

I think that this proof certainly, if nothing else, either negates or equals the proof of the Prosecution, and in the case the Prosecution has not met its burden and at this [100] hearing, to satisfy this Court that these statements should be admissible as being not only voluntarily made, but also as made following the proper advice as dictated by Mirana versus Arizona and other cases which have followed suit.

THE COURT: Is there anything you wish to say, Mr. Donovan?

MR. DONOVAN: Nothing, Your Honor.

THE COURT: Mr. Bergin?

MR. BERGIN: I just urge upon the Court the fact that this defendant is an educated or a person who is brought up in Rochester. He went to the city schools in Rochester, 10th grade. He was given an opportunity

to study electronics out of state. The detective testified here as to the advising of his rights and the defendant said at that time that he understood them.

I think that the proof is sufficient on this hearing, Your Honor.

THE COURT: Upon all the testimony received, I find that the People have proved beyond a [101] reasonable doubt that the defendant Dunaway intelligently understood the warnings and knowingly expressed his waiver of his constitutional rights.

The statements given were entirely voluntary. They were knowingly made and were made with the knowledge of the so-called Miranda rights.

Your motion, in all respects, is denied.

MR. CRIMI: Exception, Your Honor, with respect.

* * * *

DECISION OF APPELLATE DIVISION AFFIRMING
JUDGMENT OF CONVICTION

People v. Dunaway (Irving) 6-29-73....4th Dept.

COURT OF APPEALS OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

v.

IRVING JEROME DUNAWAY, APPELLANT,
ET AL., DEFENDANT

Argued September 9, 1974; decided October 23, 1974

Crimes—murder—contentions by defendant, convicted of felony murder and attempted robbery, that statements which, together with hand drawings, were made by him at police headquarters, and which, following pretrial hearing, were found to have been voluntarily made after he was advised of, and waived, his constitutional rights, were elicited following seizure of his person without probable cause, that he was not advised of his rights until after he made oral statements and drawings, that People failed to prove he intelligently and understandingly waived his rights, that admission of photographs of decedent constituted prejudicial error, that prosecutor's summation deprived him of fair trial, and that sentence imposed upon him was excessive—judgment of conviction was properly affirmed.

People v. Dunaway, 42 A D 2d 689, affirmed.

APPEAL, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered June 29, 1973, which affirmed a judgment of the Monroe County Court (GEORGE D. OGDEN, J.),

rendered upon a verdict convicting defendant of felony murder and attempted robbery in the first degree, sentencing him, upon the murder conviction, to an indeterminate term of 25 years to life, and, upon the attempted robbery conviction, to a concurrent indeterminate term with a maximum of 15 years. Defendant and one Thomas James Mosley were tried jointly for the fatal shotgun shooting of one Philip Argento, the proprietor of a pizza shop, during an attempted robbery which occurred on the night of March 26, 1971. Defendant testified that he had planned the robbery with Mosley and one Adams, a juvenile who had actually fired the shotgun, and who was a prosecution witness; that he had seen Mosley give Adams the shotgun earlier in the evening, but that he did not know Adams had it with him when he accompanied him to the pizza shop. In the Court of Appeals defendant argued that statements which, together with hand drawings, he had made at police headquarters, and which, following a pretrial hearing, were found to have been voluntarily made after he was advised of, and knowingly waived, his constitutional rights, were elicited following a seizure of his person without probable cause; that he was not advised of his rights until after he made his oral statements and the drawings; that the People failed to prove he intelligently and understandingly waived his rights; that the admission of photographs of decedent constituted prejudicial error; that the prosecutor's summation deprived him of a fair trial, and that the sentence imposed upon him was excessive.

Charles F. Crimi for appellant.

Jack B. Lazarus, District Attorney, for respondent.

Order affirmed; no opinion.

Concur: Chief Judge BREITEL and Judges GABRIELLI, JONES, WACHTLER, RABIN and STEVENS. Taking no part: Judge JASEN.

SUPREME COURT OF THE UNITED STATES

ORDERS

June 30, 1975

No. 74-5913. DUNAWAY v. NEW YORK. Ct. App. N. Y. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Brown v. Illinois*, ante, p. 590. Reported below: 35 N. Y. 2d 741, 320 N. E. 2d 646.

COURT OF APPEALS OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

v.

IRVING JEROME DUNAWAY, APPELLANT,
ET AL., DEFENDANT

Reargued November 17, 1975; decided December 29, 1975

Crimes—confessions—after Court of Appeals affirmed order of Appellate Division which affirmed judgment of County Court convicting defendant of felony murder and attempted robbery, United States Supreme Court remanded case to it for further consideration in light of *Brown v. Illinois* (422 US 590)—on reargument following remand, order of Appellate Division is modified and case is remitted to County Court for further hearing and proceedings—prior to defendant's trial, motion was made to suppress statements and drawings made by him on ground that they were obtained during period of illegal detention subsequent to illegal seizure of his person without showing of probable cause, and court ruled only that statements were voluntarily given after proper Miranda warnings and therefore were not excludable on Miranda grounds—no findings were made as to nature of detention, if that it was, and, if it was, whether there was probable cause for detention, and present record is inadequate to support determination of that question—accordingly, there must be factual hearing and such other proceedings as may be necessary to determine issues and, in event there was detention and probable cause is not found for such detention, to determine further question as to whether making of confessions was rendered infirm by illegal arrest.

REARGUMENT, following a remand by the United States Supreme Court, of an appeal, taken by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered June 29, 1973,

which affirmed a judgment of the Monroe County Court (GEORGE D. OGDEN, J.), rendered upon a verdict convicting defendant of felony murder and attempted robbery in the first degree. (See 35 NY2d 741, affg 42 AD2d 689.)

Charles F. Crimi for appellant.

Jack B. Lazarus, District Attorney (*Edward J. Spires* of counsel), for respondent.

MEMORANDUM. This case has been remanded to us by the Supreme Court of the United States "for further consideration in light of *Brown v. Illinois* [422 US 590]." (*Dunaway v. New York*, 422 US 1053.) We had previously affirmed appellant's conviction for felony murder and attempted robbery (35 NY2d 741).

On March 26, 1971, two men entered a pizza shop in Rochester, New York, and, in the course of an attempted robbery, one of them shot and killed the proprietor. Four months later, on August 11, 1971, three police officers went to Dunaway's home to question him about his participation in the robbery. If they had any reason for suspecting him the record does not disclose it. Finding him at a nearby house, the police, according to their own testimony, asked Dunaway "to come downtown * * * to talk * * * about something".

There, defendant was taken to an interrogation room where he was given warnings required by *Miranda v. Arizona* (384 US 436). He then waived his right to counsel and consented to talk to the detectives. During the course of the interview, Dunaway, at the request of the officers, drew two incriminating sketches and made two inculpatory statements.

Prior to trial, a motion was made to suppress the statements and drawings on the ground that the evidence was obtained during a period of illegal detention subsequent to an illegal seizure of appellant's person without a showing of probable cause. The court ruled only that the statements were voluntarily given after proper *Miranda* warnings and therefore were not excludable on *Miranda* grounds. The Appellate Division affirmed that decision without opinion (42 AD2d 689).

Specifically, no findings were made as to the nature of the detention, if that it was, and, if it was, whether there was probable cause for the detention and, as the District Attorney commendably concedes, the present record is inadequate to support a determination of that question. Accordingly, this case must be remitted to the Monroe County Court for a factual hearing and such other proceedings as may be necessary to determine the issues (*Morales v. New York*, 396 US 102) and, in the event there was a detention and probable cause is not found for such detention, to determine the further question as to whether the making of the confessions was rendered infirm by the illegal arrest (see *Brown v. Illinois*, 422 US 590, *supra*).

Chief Judge BREITEL and Judges JASEN, GABRIELLI, JONES, WACHTLER, FUCHSBERG, and COOKE concur.

On reargument: Order modified and case remitted to the County Court, Monroe County, for further hearing and proceedings in accordance with the memorandum herein and, as so modified, affirmed.

STATE OF NEW YORK
COUNTY COURT
COUNTY OF MONROE

THE PEOPLE OF THE STATE OF NEW YORK

—vs—

IRVING JEROME DUNAWAY, DEFENDANT

Presiding Judge: HONORABLE DONALD J. MARK,
MONROE COUNTY COURT JUDGE.

SUPPRESSION HEARING—August 3 and 4, 1976

* * * * *

[3] THE COURT: For the record, this is the case of the People of the State of New York versus Irving Jerome Dunaway. This is a hearing mandated by the Court of Appeals decision dated December 29, 1975, regarding 38 NY 2812 to determine whether the Defendant, Irving Jerome Dunaway's confession was valid or invalid under the principles enumerated under US, *Brown versus Illinois*, 442 US 590, June 26, 1975.

Is that a correct statement of the proof of the hearing?

MR. CRIMI: Yes.

THE COURT: Are the People ready to proceed?

MR. SPIRES: Yes.

THE COURT: Is the defense ready?

MR. CRIMI: Yes, your Honor.

ANTHONY L. FANTIGROSSI, called herein as a witness, first being duly sworn, testified as follows:

DIRECT-EXAMINATION

BY MR. SPIRES:

Q. Would you further identify yourself?

A. I am Chief Detective of the Rochester, New York Police Department.

Q. Your rank is major?

[4] A. Major.

Q. Tell us what rank and position you had in 1971.

A. Detective Lieutenant in charge of the Physical Crimes Squad.

Q. As such were you involved in the investigation of a homicide and robbery committed on or about March 26, 1971 on Genesee Street in the City of Rochester, known as the Tower of Pizza murder case?

A. Yes.

Q. Were you so involved on or about August 10, 1971?

A. Yes, sir, I was.

Q. And did a development occur on August 10th that you were involved?

A. Yes, sir.

Q. Tell us about that.

A. I was called at home by Detective Mickelson in regard to an informant that he received the information and the possibility of people responsible for the homicide on Genesee Street. I came into the office and I met with the informant and he conveyed to me that information that the person responsible for the robbery and shooting on Genesee Street was a fellow spending time at the jail and a fellow by the name of Irving, I don't know his last name. He said he knew what he looked like, he would put it [5] through the IDMO file. It is a file of photographs based on descriptions, height, age and weight and into that type of area. He went through the IDMO file and picked out a picture of Mr. Dunaway.

Q. This was Mickelson who done this?

A. Yes, sir. He also informed us about another man by the name of Jones. I got the report here who is now in jail pending an indictment for burglary. I went to the

jail and interrogated Jones for approximately two hours. The information they had given us was Jones admitted to Sparrow that he and Dunaway committed a robbery and killing. In talking to Jones he finally, after two hours, admitted that he had nothing to do with it. The reason he knew is he was serving time at the jail with another man by the name of Adams. Adams told him.

MR. CRIMI: I object. We are getting into hearsay far removed.

MR. SPIRES: It is admissible on the issue of probable cause to arrest. The argument as to whether or not it is insufficient hearsay, is to be made at the conclusion of the proof.

MR. CRIMI: I could understand allowing what the informant tells the witness, but now he is telling us [6] what the informant heard from somebody else. I think we are getting into a field of double and triple hearsay. That is my objection.

MR. SPIRES: I will respond later.

MR. CRIMI: I have an objection.

THE COURT: Off the record.

(Whereupon there was an off the record discussion.)

THE COURT: Please excuse the interruption. The objection is overruled.

Q. Major Fantigrossi, since the recess have you had a chance to refer to your report concerning the matter?

A. Yes.

Q. Does that report indicate whether or not the man you described as Jones, whether that was the correct name?

A. No, James Cole.

Q. If I may substitute for the name Cole for Jones, please. You used it and after you used it, after you had spoken to Mr. Cole for two hours, he told you you were about to—

MR. CRIMI: I object, that is leading.

THE COURT: Sustained.

Q. What did Mr. Cole tell you?

A. He stated to me at about a month or two before, while at jail, that there was a fellow by the name of

Adams in jail [7] with him. At the time when I was speaking, Adams was sentenced to Elmira and he told me that Adams described to him that his brother referred to as bad was involved in the Tower of Pizza shooting and his brother did the shooting which he did not intend to do. That is the way he explained it to him. The fellow with him, a fellow by the name of Irving, also known as Axlerod.

Q. Did that conclude pretty much your conversation with Cole?

A. Yes, sir.

Q. What did you do then?

A. Back to the Public Safety Building and I directed several teams of detectives to go out and see if they could find Adams and Dunaway.

Q. Had you, at that time, determined at the time you gave the direction to these teams of detectives at that time, to determine who Axlerod was?

A. Axlerod was Dunaway.

Q. You determined that through your investigation?

A. We first received the information as Irving, the picture was picked out by Sparrow.

MR. CRIMI: I object to all of this. This is a series of hearsay transactions in determination and conclusions made without any basis in fact. It [8] seems to me—

THE COURT: Overruled.

MR. CRIMI: Exception.

THE COURT: Noted.

Q. I think you interrupted in the middle of your response. The question was whether or not you had determined that Dunaway was Axlerod through the IDMO information.

MR. CRIMI: It is leading and improperly framed.

THE COURT: Sustained as leading.

Q. How did you determine that Dunaway was Axlerod?

A. That was his nickname.

Q. How did you determine that?

A. I don't know if it was on the record that we discovered that Dunaway was also referred to Axlerod.

Q. When you directed teams of detectives to seek Adams and Dunaway, what direction, if any, that you recall, did you give to the detectives concerning Mr. Dunaway?

A. Pick him up and bring him in.

Q. Did you at that time that you issued these directives believe you had probable cause to arrest Dunaway?

MR. CRIMI: I object to that question.

THE COURT: Sustained. I think that is a question for this Court to determine.

[9] Q. Did you at any time direct any of these detectives to arrest Dunaway?

MR. CRIMI: I object to the word "arrest."

THE COURT: Overruled.

THE WITNESS: I don't know if I said arrest and investigation. The name comes up and suspect's name comes up and we pick them up and bring them in for questioning.

Q. Your instruction was to pick him up and to bring him in?

A. Yes.

MR. SPIRES: No further questions.

CROSS-EXAMINATION BY MR. CRIMI:

Q. Did you testify before the grand jury on this matter?

A. I don't believe I did.

(Whereupon there was an off the record discussion.)

MR. SPIRES: In the event Major Fantigrossi testified, it will be furnished to you.

THE COURT: If Mr. Crimi wants to call him back, it will be granted.

MR. CRIMI: If I call you Lieutenant, excuse me. You have been promoted since the last time I had you. What time on August 10, 1971, that you received a call from Detective Mickelson?

A. May I refer to my report?

[10] Q. Yes.

A. 20:30 hours, would be 8:30 in the evening.

Q. That he told you at that time that he had information from an informant, is that correct?

A. Yes, sir.

Q. That information was that a James Cole was one of the people who had something to do with the killing of Philip Argento?

A. Correct.

Q. During that phone call with Mickelson, did he mention anything about Dunaway or Adams?

A. No, sir.

Q. Did he tell you who the informant was who told you James Cole was one of the participants?

A. Yes, he did.

Q. Who was the informant?

A. O. C. Sparrow.

Q. So, when you left to go to the Public Safety Building, you were thinking in terms of having James Cole picked up, is that correct?

A. First I wanted to talk to O. C. Sparrow before we went to Cole. I wanted to talk to Sparrow. Sparrow was interrogated.

Q. You wanted to check out the information that Cole had given [11] to Mickelson?

A. No, Sparrow had given to Mickelson.

Q. Sparrow had given to Mickelson?

A. Yes.

Q. Then you did talk to Sparrow, is that correct?

A. Yes, sir, I did.

Q. Had you ever had occasion to talk to Sparrow before?

A. I don't believe so.

Q. And Sparrow told you that Cole had said to him that he, Cole and someone by the name of Irving had been involved in the shooting?

A. Yes, sir.

Q. It turned out it wasn't true that Cole was involved in the shooting?

A. We found that out after we questioned him at the jail.

Q. Cole was already incarcerated?

A. Yes, sir.

Q. Now, you also testified that you then talked to Adams, is that correct?

A. No.

Q. You didn't?

A. No, I didn't testify to talking to Adams.

Q. Somebody talked to Adams, who was it?

[12] A. You mean Dunaway was picked up?

Q. Yes, sir.

A. No, sir, Adams was picked up after Dunaway.

Q. There is two Adams?

A. No, the other Adams was in Elmira. Cole had talked to Adams.

Q. Cole told you he had talked to Adams, which Adams?

A. This is Hubert Adams, the brother of the 15-year-old that was arrested on the case.

Q. And Cole, did you talk to Cole and Cole stated to you that he had talked to Hubert Adams?

A. Yes, sir.

Q. Two months before?

A. I am not sure. Let's see, yes, about two months before, right.

Q. That Hubert Adams had told him that his brother BayBay was an individual by the name of Irving, had committed this robbery and murder at the Tower of Pizza?

A. Yes.

Q. Now, had you ever had any dealings with James Cole?

A. No, sir.

Q. And Cole denied that he was involved, is that correct?

A. Yes, sir.

[13] Q. Based on what Cole had told you, you then directed certain men to pick up Adams and Dunaway, is that correct?

A. Yes, sir.

Q. Now, how did you bring that about? How did you make that direction?

A. Well, I am trying to remember as best I can. If I could go with the usual procedure, I informed them to

bring Dunaway in for questioning and Adams in for questioning.

Q. How many men did you call in?

A. I am not sure. I may have called another team.

Q. When you say "team"—

A. Two men.

Q. And, well, one of the teams must have been Mickelson and Luciano?

A. Right.

Q. Were they on duty at that time?

A. I believe Mickelson was just finishing. I am not sure, it is hard for me to remember. Mickelson was involved in the investigation. When they called me in with Detective Ruvio. There is two or three people, this is Section C, detectives, they do not work in Physical Crimes Squad.

Q. Were they in headquarters?

[14] A. They were in my office before I got there originally.

Q. Both teams were in your office?

A. I called the other team after I got the information.

Q. Where was the other team, on duty?

A. No, they went home.

Q. So, you called them at home and told them—what did you tell the other team?

A. They were looking for Dunaway and Adams.

Q. You told them to come in?

A. I believe Novensky and Joe Dominick, I am not sure if they came in that night or not. They were the two detectives. It is hard for me to recall who I called in at that time. I don't have it on my report.

Q. When you gave instructions to your subordinates to pick up an individual, you mean for them to actually bring them physically to headquarters?

A. Definitely, sir.

Q. I take it you made no application for an arrest warrant?

A. No.

Q. You just told them go out and pick them up and bring them in?

A. Yes, sir.

Q. Based upon the information that you had received from Cole, [15] is that correct?

A. Correct.

Q. Now, you never yourself talked to Hubert Adams?

A. No, sir.

Q. Do you know whether Mickelson did?

A. No, sir, he wasn't even here. He was in Elmira.

Q. Who is Hubert Johnson, do you know?

A. Hubert Johnson?

Q. Yes. Did you ever hear that name? I am looking at this now.

A. I didn't hear of that name. No, sir.

Q. Now, were you contacted radio-wise with any of the teams as to whether or not they had successfully succeeded in picking up Dunaway?

A. Not radio-wise. I was in my office, I stated that I didn't know how late I was there. Dunaway was picked up the next morning. I am not sure if I was in my office when he was picked up.

Q. Did you leave instructions that they were to call you when he was picked up?

A. Yes, sir.

Q. Along with your direction, they were to be picked up and brought to the Public Safety Building?

[16] A. Right.

Q. He was going to be questioned, is that right?

A. Correct, sir.

Q. Did you instruct them at the time they picked him up that they would tell him what he was being picked up for?

A. They knew just as much about the case as I did. I doubt very much if I gave them instructions.

Q. Did you advise or instruct them to advise him of his rights when he was picked up?

A. That is the standard procedure. I didn't give them that type of instruction. They are aware of it already.

Q. Did you give them any instruction in the event that Dunaway didn't want to come down to headquarters?

A. No, I did not.

Q. You just said to them to go out and pick him up and bring him in, is that correct?

A. Correct.

Q. I take it, obviously, if you said nothing further that you didn't tell them to make an appointment with him to come in on some other day?

A. No, sir, I wouldn't advise them that way.

Q. Did you do any other further checking before you gave those instructions as to the—Mr. Dunaway's involvement in that [17] matter?

A. Did I do anymore what?

Q. Did you check out Cole's story further before you told the teams to go out and pick up Dunaway?

A. No, sir.

Q. Did you at any time interrogate Dunaway?

A. I believe I spoke to him after he was brought in.

Q. That was when, in the morning?

A. Yes.

Q. That was—do you recall whether this was before or after Detective Novensky spoke to him?

A. I believe—I just can't recall. I know I did speak to Mr. Dunaway.

Q. At some point?

A. Yes, sir.

Q. But you were not there when he was physically picked up at 102 Walnut Street?

A. No.

Q. Did you get a call via the radio or other form of communication when he was picked up at the time he was picked up?

A. I don't recall, but I can't recall how I found out about it, sir.

Q. At any time did you apply for an arrest warrant?

[18] A. No, sir.

Q. There was no question in your mind that he was to be picked up and was to be brought to police headquarters for questioning?

A. No question at all, counselor.

Q. And you did not give any instruction that he should be questioned where they found him or made an appointment for him to come back later?

A. No, sir.

Q. Now, actually, August 10, 1971, when you received this information, was some three or four months after the murder, is that correct?

A. Yes.

Q. Where this crime took place was quite a distance from where they picked up Mr. Dunaway, is that correct, sir?

A. Walnut Street, I would say is a mile, a mile and a half from Genesee Street.

Q. It is not in the approximate neighborhood?

A. No, sir.

Q. This information that Mr. Cole related to you was in itself a month or two old when he had talked to Hubert?

A. Right.

MR. CRIMI: No further questions.

[19] REDIRECT-EXAMINATION BY MR. SPIRES:

Q. At this time you gave the instructions to detectives to pick up Dunaway and bring him in. Did you ever consider applying for an arrest warrant?

MR. CRIMI: I object.

MR. SPIRES: You asked him.

THE WITNESS: I didn't have enough information to get a warrant.

RECROSS-EXAMINATION BY MR. CRIMI:

Q. You had not enough information to get a warrant, Major, but there is no question that you wanted him physically brought down to headquarters and questioned at headquarters, is that correct?

A. That's correct.

Q. I take it that you are saying you didn't think that your information would have required an application for an arrest warrant?

A. That is correct.

Q. You're allegedly saying that your information was sufficient to physically pick up a suspect and bring him down to headquarters?

A. I wouldn't do it any other way, counselor.

Q. And do you think that—did you tell him he had to come [20] down voluntarily or had to bring him down?

A. I told him to bring him in.

Q. You told them to arrest him?

A. If you are talking about taking away the freedom of movement, if that is the word, yes, then it is arrest.

Q. Yet if you restricted his freedom of movement and it is an arrest, you still don't think you had probable cause, do you?

A. I think I had probable cause to bring him in and pick him up. I doubt if I had probable cause to charge him.

Q. You differentiated between probable cause to arrest a person and probable cause to charge a person?

A. Right, counselor.

Q. How do you differentiate a probable cause for a warrant of arrest from probable cause from seizing a person and bringing him in to headquarters?

A. Probable cause to obtain a warrant, you must have enough information to substantiate a charge. In probable cause of picking up a man for questioning, which is done all the time based on information, this is done also.

Q. Well, it is not what is done—

A. That is to bring him in. I think I have that right as a police officer. If I haven't, I just found out.

[21] Q. You think you have the right to physically remove a person from his home and bring him down to headquarters with insufficient information to get an arrest warrant?

A. Yes, I would say yes.

Q. So, that you don't want Mr. Dunaway to be detained on the spot and questioned, you wanted him physically brought down to headquarters and in your interview rooms to be interrogated?

A. That's true, counselor.

MR. CRIMI: Thank you. That is all.

REDIRECT-EXAMINATION BY MR. SPIRES:

Q. As long as you are talking about standard procedures in this area, did you at any time direct your detectives who were sent on missions to pick up suspects and bring him in for questioning, did they have a particular procedure to follow?

MR. CRIMI: I object to the standard procedures. They may be wrong for all I know.

MR. SPIRES: So, what—

MR. CRIMI: That is not the issue. What did they do in this case?

MR. SPIRES: It certainly is. If their procedures are to go out and pick up somebody and bring them in, [22] they might not find it necessary to pick the person up. This is the area that I want to find out.

THE COURT: I think you should give the question to Officer Fantigrossi as to what the instructions were of Fantigrossi of the teams.

Q. Let me ask a further question. I will strike that. I think perhaps another witness may clarify the matter. Thank you.

(Whereupon the witness was excused.)

GERARD LUCIANO, called herein as a witness, first being duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. SPIRES:

Q. Before we proceed with the questioning, may I ask Court to take judicial notice of the entire transcript of the prior proceeding before Judge Ogden which constitutes a pretrial hearing under the admissibility of the confession and statement so that the entire transcript may be considered as evidence in the case.

MR. CRIMI: I quite frankly, I don't know what the procedure is and how these proceedings are to be handled. I don't know what your Honor wants as far as this hearing is concerned. The mandate [23] from the Court of Appeals seems to indicate they wanted to find out whether there was an illegal detention or custody involved and

what effect that would have to the subsequent taking of the statement.

Now, somehow I think that, however you want to word it or phrase it, the records of the first trial, particularly the pretrial suppression hearing certainly should be part of this proceeding, but this is on the other hand a supplemental hearing. I don't want to be restricted as to what was in the record.

THE COURT: Insofar as applicable, the Court will take into consideration the pretrial hearing and you are not limited to follow the mandates of the Court of Appeals and elicit any testimony that you find applicable to this proceeding.

(Whereupon Mr. Spires commenced his direct-examination of Officer Luciano.)

Q. Now, Gerard Luciano, what is your present rank and position?

A. I am Detective, Grade B, assigned to the Narcotics Squad.

Q. The Rochester Police Department?

A. Yes, sir.

[24] Q. You testified, did you not, at a previous hearing before Judge Ogden in this matter?

A. Yes, sir.

Q. And have you had occasion before taking the stand today to read over that prior testimony that you gave and to refresh your recollection?

A. Yes, sir, I did.

Q. And referring, if I may, to your previous testimony in 1971. I believe you went to Dunaway's house where Dunaway was located on August 11, 1971?

A. Yes, sir.

Q. I think you testified there was a time you came out of the house?

A. Yes, sir.

Q. Did you see him emerge from the doorway of the house?

A. Yes, sir.

Q. Then did you go over to him at that place?

A. Yes, sir, when he was coming down the steps.

Q. Did you, if you recall, touch him in any way?

A. No, sir, not that I can remember.

Q. Again, referring to your prior testimony, as I understand it, Detective Mickelson walked with Dunaway to the police car?

[25] MR. CRIMI: I object to this. I am trying to make a record here and referring to the Defendant, I feel it would be ordinarily, if he asked what he did on that particular day.

MR. SPIRES: I am trying to avoid duplicating the record.

MR. CRIMI: I don't know how you are going to review the case going from the testimony here and going back to the trial at the time or previous records.

MR. SPIRES: I am willing to let Mr. Crimi have whatever leeway he needs on cross-examination as to both questions asked, today or previously asked.

MR. CRIMI: That is not the point. The point is you should ask him what he did on that particularly day and not referring to the testimony. How do I cross-examine him? I object to the form of the question.

THE COURT: You want it treated as a de novo hearing?

MR. CRIMI: Yes.

MR. SPIRES: I don't think that is the intent of the Court of Appeals. The issue is not developed in the prior hearing.

THE COURT: I am sure your understanding of that decision is correct.

[26] MR. SPIRES: I am trying to avoid duplicating where Judge Ogden went through and agree the question is leading. I explained why I was proceeding in that fashion.

Q. Did you have any instructions from anyone that morning, the morning of August 11, 1971 what to do with relation to Dunaway?

A. No, sir.

MR. CRIMI: No?

THE WITNESS: No.

Q. How did you come to be at the premises where you encountered Dunaway?

A. I was sent to the Public Safety Building to pick up Mickelson and Ruvio. On the way back to the unit we were working they decided to stop by Broad Street where Dunaway lived to find out one more time if he was home.

Q. Did you go from the Public Safety Building to pick up Mickelson and Ruvio?

A. No, sir, I went to the Public Safety Building to pick them up.

Q. And then the three of you proceeded to Broad Street to try one more time to locate Dunaway?

A. Yes, sir.

[27] Q. You hadn't previously tried to locate them?

A. No, sir.

Q. You and Mickelson and Ruvio had?

A. Yes.

Q. Were you just transportation for those two detectives?

MR. CRIMI: I object, it is leading and suggestive.

THE COURT: Sustained as leading.

Q. Did you know the purpose of Mickelson and Ruvio's trip to Broad Street?

MR. CRIMI: I object to that, your Honor.

THE COURT: Overruled.

THE WITNESS: To see—

MR. CRIMI: It is calling for him to know the operation of the mind of Ruvio and Mickelson.

MR. SPIRES: Maybe they told him.

MR. CRIMI: That is hearsay.

MR. SPIRES: So hearsay is permitted by statute on this hearing.

THE COURT: You may ask what they told him as to the hearsay, it is overruled.

MR. CRIMI: Exception.

THE COURT: Exception noted.

Q. Did you know why they were going out there?

[28] A. Yes, sir.

Q. Why?

A. To see if Dunaway was home.

Q. Do you know why they wanted to do that?

A. Yes, sir, they were going to pick him up if he was home.

Q. Now, how do you know that?

A. They told me that.

Q. Who told you?

A. Mickelson.

Q. What did he say?

MR. CRIMI: This is not on the probable cause, this is plain hearsay.

MR. SPIRES: Mr. Crimi made the same objection at the original hearing. The U. S. Supreme Court, both Federal and State Supreme Court said hearsay is admissible when dealing with the case of probable cause to arrest. Does this particular question have anything to do with probable cause?

MR. CRIMI: I don't, your Honor—I don't want to elongate the hearing. If there comes a time when this individual, who is on the stand, says he did arrest Dunaway, then I could see that the hearsay comes in. We are at a point, from what I under- [29] stand, that he was there as transportation for Ruvio and Mickelson. I don't think there is proper foundation laid.

MR. SPIRES: If I can, more than on the issue of probable cause, Article 740 of the Criminal Procedure Law, the procedure to be followed on the suppression hearing which this is, hearsay evidence is admissible.

THE COURT: Is this relevant to probable cause? That is Mr. Crimi's objection.

MR. SPIRES: If he wants to object on those grounds, I will let the Court rule. I believe it—

MR. CRIMI: My objection is that we have not established what Officer Detective Luciano did there yet, as far as I know.

THE COURT: Sustained at this time.

Q. I would ask the Court to note and Mr. Crimi to note that the Court has taken judicial notice of this witness's prior testimony. All that is in the record, I am trying to bring out something additional we don't have is what the Court of Appeals wanted us to do.

Who was the first person to speak to Mr. Dunaway on that morning of the 3rd?

[30] A. Detective Mickelson.

Q. And did you—were you with Mickelson when he spoke to Dunaway?

A. I was present, yes.

Q. How far away were you when you first spoke?

A. In distance, I can't remember. I was close enough to see Mickelson and the front door and the steps.

Q. Do you know if Dunaway said anything to Detective Mickelson?

A. No.

Q. You don't know or he didn't say?

A. No, I don't know.

Q. Do you know if you heard everything Mickelson said to Dunaway?

A. I heard Mickelson talk to Dunaway.

Q. Do you know if you heard everything Mickelson said to Dunaway?

A. No.

Q. Can you tell us what you did hear Mickelson say to Dunaway?

A. Mickelson said, "Axlerod, Dunaway, do you want to come downtown with us?"

Q. Do you want to come down?

MR. CRIMI: I object to your question. Let him testify.

THE COURT: He is repeating it. Overruled.

[31] MR. CRIMI: Exception.

Q. Did you hear any response by Dunaway?

A. No, I did not.

Q. What happened after you heard this request or statement by Detective Mickelson?

A. Detective Mickelson waved me over to the porch and he started down the steps and Dunaway came after him.

Q. And then?

A. We walked to the police car parked on Broad Street.

Q. The three of you?

A. Yes, sir.

Q. At any time did you observe Mickelson touch Dunaway?

A. No.

MR. SPIRES: No further questions.

(Whereupon the Court was in recess for the date August 3, 1976.)

(Whereupon the Court convened on August 4, 1976.)

(Whereupon Mr. Luciano retook the witness stand, previously sworn as a witness.)

MR. SPIRES: May I be permitted to ask another question or two of the witness?

THE COURT: Yes.

(Whereupon Mr. Spires continued his direct-examination of [32] Mr. Luciano.)

Q. Detective Luciano, did you have a conversation with me a few minutes before court this morning?

A. Yes, sir, I did.

Q. What was the subject of that conversation?

A. I stated to you yesterday when I testified yesterday that I testified I heard Mickelson tell the man at the door, Dunaway, do you want to come downtown with us. I didn't hear him tell Dunway, Mickelson told me.

Q. You are testifying something you stated yesterday was incorrect?

A. Yes. When Mickelson waved me over to the porch he told me, I told him do you want to come downtown, we want to talk to you. He is going with us.

MR. CRIMI: I object. How does that have to do with probable cause?

THE COURT: He is correcting the testimony, is that correct, Mr. Spires?

MR. SPIRES: Yes, sir.

MR. CRIMI: I guess you overruled my objection.

THE COURT: I think you have a motion to strike at the conclusion of the question and answer.

A. Then we proceeded to the police car.

[33] Q. Let me ask you to clear up the record. When Detective Mickelson spoke to Dunaway on the morning of August 11th, did you hear Detective Mickelson speak to Mr. Dunaway?

A. Yes.

Q. Did you hear what he said?

A. Just Axlerod or Dunaway, that was it.

Q. The part about coming downtown was not done by you?

A. No, sir.

Q. That was told to you later?

A. Right.

CROSS-EXAMINATION BY MR. CRIMI:

Q. Detective Luciano, the events you have been testifying to occurred on August 11, 1971?

A. Yes, sir.

Q. I think you testified—strike that. About what time was it that you went to the home of Mr. Dunaway on Broad Street?

A. Around 8:00 o'clock.

Q. In the morning?

A. Yes.

Q. What was your tour of duty that particular day, August 11, 1971?

A. 7:00 in the morning to 3:00 in the afternoon.

Q. Prior to 7:00 in the morning, had you had anything to do [34] with this particular case?

A. No, sir.

Q. I take it that prior to 7:00 o'clock in the morning, August 11, 1971, you had no conversation with Lieutenant Fantigrossi?

A. No, sir.

Q. Not correct?

A. No conversation.

Q. Can you tell us—strike that. You started your tour of duty at 7:00 that morning?

A. Yes, sir.

Q. I take it you went to the police headquarters?

A. No, sir.

Q. Where did you go?

A. At the time we were working out of an office at the Police Academy on Scottsville Road.

Q. That is where you reported that morning?

A. Yes, sir.

Q. Approximately an hour later you were on Broad Street?

A. Yes.

Q. How did you get there?

A. By car.

Q. How did it come about that you got a car and went to Broad [35] Street?

A. I picked up the car at the unit office and told to go to the Detective Bureau and pick up Ruvio and come back to the office.

Q. Was anything said to you as to why you were to do that?

A. No, sir.

Q. You did come down to police headquarters from the Academy with your car?

A. Excuse me, I did or didn't?

Q. Did.

A. Yes, sir.

Q. What time did you get to police headquarters?

A. I don't know 7:30, quarter after seven.

Q. And at that time, that time you picked up Mickelson or plainclothesman Mickelson and who else?

A. Ruvio.

Q. What directions, if any, were you given at that point by either Ruvio or Mickelson?

A. They said let's go by Broad Street and see if Dunaway is home.

Q. Was that the only conversation you had about what you were going to do that morning?

A. No, they said they were going to pick him up.

[36] Q. Did they tell you they had been looking for him all night long?

A. Yes, sir, they said they had been there before.

Q. Did they tell you whether or not they had instructions to pick them up from Lieutenant Fantigrossi?

A. No, they said they were going to pick him up if he was there.

Q. Did you discuss how he was going to be picked up?

A. I assumed just pick him up.

Q. Well, was there any particular plan discussed as to who would do what and how you would execute the picking him up?

A. No.

Q. The only conversation you had from police headquarters from Broad Street was that you were going to pick him up, is that correct?

A. I imagine there was another conversation.

Q. You mean concerning this case?

A. Yes, sir.

Q. That is all that was said?

A. More or less.

Q. You all were armed?

A. Yes, sir.

Q. You had—who was driving?

[37] A. I drove down.

Q. And Mickelson and Ruvio, I take it one was in the front and one in the back seat?

A. Yes.

Q. Now, there came a time, then, you got to Broad Street, is that correct?

A. Yes, sir.

Q. Do you remember the address at Broad Street?

A. Not the street number, no.

Q. What did you do when you arrived at Broad Street?

A. We left the vehicle.

Q. No, what did you do, you left the vehicle?

A. And I stood in the driveway of the house by the sidewalk and Mickelson and Ruvio went to the door and entered the house.

Q. Were you talking about Broad Street?

A. Yes, sir.

Q. Now, you were on Broad Street. This was this house between what street, if you recall?

A. Near Walnut Street.

Q. Very far away from Walnut?

A. No, sir, not that far.

Q. And from where you were standing on Broad Street address, on [38] the driveway, could you see Walnut?

A. Parts of it, yes.

Q. Was there no obstruction between you and Walnut?

A. I could see the intersection. That is about it.

Q. Now, how long was Ruvio and Mickelson in the Broad Street?

A. I would say no more than five minutes.

Q. Now, during that five minutes you were in the driveway, is that correct?

A. At the driveway and sidewalk, yes.

Q. Was there any reason why you were outside while the other two were in?

A. Yes, I was just stationed outside to watch for anything unusual.

Q. Was this pursuant to some instruction?

A. No, sir.

Q. Well, did you all leave the car on your own? You decided not to go in and to stay outside?

A. The only thing I say to them, I will stay outside and you two go in.

Q. Were you in charge of the operation?

A. No, sir.

Q. Who was in charge of the operation?

A. Mickelson and Ruvio's investigation, as far as I was [39] concerned.

Q. They didn't tell you to stay outside?

A. No, sir.

Q. You decided you were going to stay outside yourself?

A. Yes.

Q. This was for if something unusual might happen, is that correct?

A. Yes.

Q. What were you thinking in terms of unusual?

A. Sometimes when police go to houses, people do strange things. They leave by windows and jump out of second story windows.

MR. SPIRES: I could see the direction which this cross-examination is leading and I would be willing, if

Mr. Crimi agrees, to stipulate that Detective Ruvio and Luciano and Mickelson went looking for Dunaway on the morning of August 11, 1971 with the intention of taking him into custody physically, if that was necessary and bringing him to the Public Safety Building.

THE COURT: Is that agreeable?

MR. CRIMI: I will take the stipulation, I don't want to curtail my cross-examination.

THE COURT: Very well. Proceed.

40] Q. In other words, you were there to make sure that Dunaway didn't get away, is that correct?

A. Yes, sir, if need be.

Q. What were you prepared to do in the event he tried to get away?

A. Stop him.

Q. Were you prepared to use any physical force, if necessary?

A. That is a tough question. If physical force was used against me, probably yes, but otherwise, no.

Q. Would you let him flee without trying to tackle him?

A. I probably would try and tackle him.

Q. You were intent in seizing him that morning, is that correct?

A. If need be, yes.

Q. Did you have a warrant of arrest on you?

A. No, sir, I did not.

Q. Any of the three have a warrant of arrest?

A. No, sir.

Q. Now, while you are standing on this driveway, what, if anything, did you observe?

A. A young lady come out of the house, out of the side door.

Q. What did you do then?

A. She walked by me and I said good morning. She walked down [41] Broad Street, turned the corner and went into a house on Walnut Street.

Q. Were you able to see her take that course on Broad Street all the way to Walnut Street?

A. Yes, sir.

- Q. There was nothing obstructing your vision?
 A. No, sir, I followed her.
 Q. You saw her go into some house on Walnut Street, is that correct?
 A. Yes, sir.
 Q. Now, Walnut Street runs, it is a side street that comes into Broad Street, is that correct?
 A. Yes, sir.
 Q. I would say, correct me if I am wrong, it runs east and west?
 A. No, I would say Walnut runs north and south.
 Q. And Broad Street runs east and west?
 A. Yes.
 Q. So you would say that Walnut runs north and south and Broad Street runs east and west, is that correct?
 A. More or less, yes.
 Q. You followed this young lady down Broad Street. How far were you stationed in the driveway at the corner of Broad [42] and Walnut be?
 A. 100 feet or less.
 Q. And then did you follow her to the house on Walnut Street or did you stay at the corner and just note the house?
 A. No, sir, I stayed at the corner and noted the house.
 Q. Could you see the address where you were?
 A. No.
 Q. How did you fix that house in your mind?
 A. By the color and location on the street.
 Q. Is it a fair statement to say that is about the third house from the corner of Broad and Walnut?
 A. I think it was.
 Q. And these houses are cottage-type houses, is that correct?
 A. They are small, yes, sir.
 Q. They have a stoop about three stairs?
 A. Yes, sir.
 Q. And they are fenced in?
 A. I don't remember being fenced in.
 Q. And they have all small driveways?
 A. Yes.

- Q. Now, thereafter you did what, after you viewed this lady or young girl going toward this address?
 A. When Detective Mickelson came out I asked him if he knew [43] who the young lady was who came outside and he said he didn't see any young lady. I informed him she came out the side door and went to a house on Walnut Street.
 Q. All of you went to the house on Walnut?
 A. No, sir.
 Q. Who did?
 A. Mickelson and myself.
 Q. Did you walk down there together?
 A. Yes, sir.
 Q. What discussion did you have?
 A. We thought maybe that is where Dunaway might be.
 Q. Did you both go up to the doorway of the house on Walnut?
 A. No, sir.
 Q. What did you do and where did you go?
 A. I stood down in the driveway.
 Q. Now, in other words, you assumed the same position that you had before at Broad Street, you did the same thing on Walnut and you stayed outside the driveway?
 A. Yes, sir.
 Q. Was that for the same reason you avoided any possible flight or escape by Dunaway?
 A. Yes, sir.
 Q. And were you posted in the driveway?
 [44] A. Right in the middle of the driveway, even with the front porch or door so I could see Detective Mickelson.
 Q. Also, to make sure nobody left that house?
 A. Yes.
 Q. Such as Dunaway?
 A. Yes, sir.
 Q. Now, correct me if I am wrong. That is a small driveway, is it not?
 MR. SPIRES: I object.
 MR. CRIMI: Strike that.
 Q. How wide would you say that driveway is?
 A. I really don't know. I couldn't tell you in feet.

Q. Well, you have seen a lot of driveways, I take it, in your lifetime. Can't you estimate as to whether it was six foot wide or seven foot wide or eight foot wide?

A. I wouldn't estimate.

Q. From where you were positioned, how far were you from the stairs and door at 102 Walnut?

A. I don't really remember. The only thing I remember is I kept Detective Mickelson in sight, as far as feet or distance, I don't know.

Q. Were these small or large lots?

MR. SPIRES: I object to the form of the question.

[45] THE COURT: Sustained.

Q. Can you tell us how wide the lots upon which this house was built was?

A. No.

Q. You have no idea how far away were you from where you heard these so-called words of Mickelson?

A. No, sir.

Q. Absolutely no idea?

A. Not absolutely no idea, I can't testify, six feet. I don't remember how far it was.

Q. There is nothing I could do to refresh your recollection at this point?

A. I don't think so.

Q. At any rate, from that standpoint, what did you observe, if anything?

A. I observed Detective Mickelson knock on the door.

Q. Did you hear the knock?

A. Yes, sir.

Q. You heard the knock?

A. Yes, sir.

Q. And what else did you observe, if anything?

A. I heard Mickelson say, "Axlerod or Dunway."

Q. Well, did you observe the door being opened?

[46] A. No.

Q. Did you observe Mr. Dunaway?

A. Not at that time, no.

Q. Did you observe anybody else at the doorway at that time?

A. No.

Q. So, you are, if we may call it, an observation, all that you experienced at that time was hearing Mickelson saying that, Dunaway or Axlerod?

A. Yes, sir.

Q. Did you observe Mr. Mickelson with a picture of Dunaway in his hand?

A. No, sir.

Q. Did you see a picture of Dunaway before that?

A. I don't think so, no, I didn't.

Q. There wasn't a picture at all that was shown to you or anybody else in the car on the way down to Broad Street?

A. I never saw a picture, if there was one, no, sir.

Q. Never saw one in anyone's possession?

A. No, sir, not that they showed me.

Q. All right. You didn't see Dunaway? All you heard was Mickelson say Dunaway and Dunaway or Axlerod?

A. Yes.

Q. I don't know whether you understand, whether he said both [47] of those or I can't remember whether he said Dunaway or whether he said Axlerod.

A. He said both of the names, Axlerod was the nickname. Dunaway was the last.

Q. Exactly what did you hear?

A. Axlerod or Dunaway.

Q. Did you hear the word "or"?

A. No, I heard Axlerod and Dunaway.

Q. You heard two words, Axlerod, Dunaway?

A. Yes.

Q. Well, what did you observe after that?

A. Detective Mickelson waved me to the porch, like a gesture.

Q. Did he say anything at all?

A. No.

Q. Nothing at all?

A. No, sir.

Q. Didn't say I got him?

A. No, sir.

Q. I found him?

A. No, sir, went like this—

- Q. Just waved, didn't say a word?
- A. No.
- Q. What did you do then?
- [48] A. I went to the bottom of the stairs.
- Q. Did you do anything else?
- A. That is when Mickelson told me.
- Q. Where was Mickelson at this point, the top or the bottom of the stairs?
- A. Still at the top.
- Q. Where was Dunaway?
- A. Coming out the door.
- Q. What, if anything, did you observe concerning Mickelson and his hands? Did Mickelson have his hands on Dunaway in any way, form or fashion?
- A. No, sir.
- Q. Did he have him by the arm?
- A. No, sir.
- Q. You are positive?
- A. Yes, sir.
- Q. Did he have him by the belt?
- A. No, sir.
- Q. You were able to observe that?
- A. Yes, sir.
- Q. You say Dunaway came down the stairs, is that correct?
- A. Yes, sir.
- Q. Without any assistance from anyone, is that correct?
- [49] A. Yes.
- Q. When he got to the bottom, where were you? Did you put your hands on his arm or pants or anything?
- A. No, sir, not that I can remember.
- Q. You say you can't remember. Do you know or don't you know?
- A. If I grabbed him? I think I would have remembered.
- Q. What you are saying is you didn't touch him, is that correct?
- A. My answer is, no, I don't remember.
- Q. At any point did you observe Mr. Mickelson either holding him or in any way touching his arm or pants?

- A. No, sir, not that I remember. He didn't touch him at all.
- Q. So did you?
- A. No, sir, not that I can remember.
- Q. When you say you can't remember, is that possible that you did and can't remember?
- A. No, sir, I think if I did I would remember.
- Q. As far as Mickelson is concerned, he never—is it your testimony that from your observation, that at no time did you see him have a hold of Mr. Dunaway's arm or pants?
- A. No, sir.
- Q. Or belt? It is your testimony that all three of you, Dunaway and you and Mickelson were walking with your arms [50] free of each other?
- A. Yes, sir.
- Q. Now, you never heard Mickelson ask Mr. Dunaway whether he wanted to come downtown or not, is that correct?
- A. No, sir.
- Q. You never asked Dunaway whether he wanted to come downtown?
- A. No, sir.
- Q. What, if anything, did you do from the time that you came into the bottom of the steps to the time that Dunaway was brought to the police car?
- A. I stayed with Detective Mickelson and Dunaway.
- Q. Just walking beside them?
- A. Yes, sir.
- Q. At that point you would say Mr. Dunaway was free to go or wasn't he?
- A. That decision would be made by Mickelson at that point, not me.
- Q. There never was any discussion about that at all before you went to that house with Mickelson as to what you would do?
- A. Regarding what?
- Q. In case Dunaway didn't want to come down?
- A. No, Mickelson would make that decision when the time came, [51] if need be.

In making their determination, the petitioner respectfully submits that the Appellate Division erroneously equated "voluntariness" (the Fifth Amendment threshold question) with factors relevant in determining free will (Fourth Amendment application of the exclusionary rule). Therefore, the Appellate Division basically found that the prosecution had met their burden of showing voluntariness, which merely indicates that they were only able to establish the "threshold requirement" as established in *Brown*. The two dissenters and the hearing court correctly found "there were insufficient intervening circumstances to attenuate the confession and remove the tainted effect of the arrest . . ." *People v. Dunaway, supra*, at 305 [Denman, J., concurring]. Petitioner will now show how "the facts in this case are almost on point with those in *Brown*." *People v. Dunaway, supra*, at 308 [Cardamone, J., dissenting].

In order to determine whether the primary taint of petitioner's arrest has been purged, the Court, in addition to finding that Miranda warnings were given, must consider the three factors outlined in *Brown*.

First, "the temporal proximity of the arrest and the confession." Dunaway was arrested and taken to police headquarters at approximately 9 A.M. (A-6). After making an oral confession, a stenographer was called and began recording a second statement at approximately 10:20 A.M. (A-9). The petitioner confessed within an hour and one-half after his being arrested at police headquarters. In *Brown*, the "first

statement was separated from his illegal arrest by less than two hours" *Brown v. Illinois, supra* at 604.

Secondly, we must examine "the presence of [any] intervening circumstances." *Brown v. Illinois, supra*, at 604. Neither of the courts below have found nor has the prosecutor alleged that there were any intervening events of any significance. There was no lawful arraignment, release from custody or entry of counsel into the situation. Therefore, as in *Brown*, it can be accurately stated that "there was no intervening event of significance whatsoever." *Brown v. Illinois, supra*, at 604; emphasis added.

The third factor outlined by this Court in *Brown* was "the purpose and flagrancy of the official misconduct" *Brown v. Illinois, supra*, at 604. Clearly, in the case at bar, as in *Brown*, the detectives acknowledged that the purpose of the action was to bring in the petitioner "for questioning" in the hope that something might turn up. (A-56-57; 99). As detective Mickelson stated, "... he was in custody for an interview, an interrogation." (A-105). The apprehension of this petitioner was clearly investigatory "in design and execution." See, *Brown v. Illinois, supra*, at 605. The police action in this case constitutes flagrant official misconduct as well. The detectives knew they lacked sufficient information to obtain a warrant (A-60), so they acted without one (A-61). They went to a private dwelling prepared to make an arrest without a warrant when there were absolutely no exigent circumstances to justify that type of police action. It should

be noted that this Court has not retreated from its holdings which require police to use the warrant procedures whenever practicable. See *Terry v. Ohio*, *supra*, at 20 citing, *Katz v. United States*, 389 U.S. 347 (1967) *Beck v. Ohio*, 379 U.S. 89, 96 (1964); *Chapman v. United States*, 365 U.S. 610 (1961). The fact that the police did not originally confront the petitioner with their weapons drawn is the only fact which tends to mitigate the flagrancy of their conduct. It should not be forgotten that the petitioner was a teenager who had never been questioned by the police before (A-37) and his request to find out why he had to go downtown to be questioned was answered with a response of "you'll find out when we get there" (A-100). It is only natural that he would be in fear of what would later happen to him. Further, the police in arresting petitioner without probable cause never advised him of his right not to go downtown with the police (A-81). See *Brown v. Illinois*, *supra*, at 601 footnote 6.

The flagrant official misconduct of the police in this case should not be condoned by this Court or any other court. The petitioner's Fourth Amendment rights were clearly violated and his subsequent confessions² and sketches should properly be excluded from evidence. *Brown v. Illinois*, *supra*; *Wong Sun v. United States*, *supra*.

Point II: Should This Court Choose To Differentiate Between "Arrest" And/Or "Seizure" And "Detention" And Should It Find That This Petitioner Was Not "Arrested," Then Did Petitioner's "Seizure For Purposes Of Detention And/Or Interrogation" Violate The Fourth Amendment.

Petitioner believes that his confrontation with the police in this case constituted an "arrest" (Point I(A)) and, therefore, his subsequent confession should be suppressed under this Court's holdings in *Brown v. Illinois*, *supra* and *Wong Sun v. United States*, *supra*. However, since it appears that there may be a technical distinction between "arrest" and "a seizure for purpose of detention and/or interrogation," petitioner will establish that his "arrest" or "seizure and detention" was in violation of the protections provided by the Fourth Amendment.

Petitioner would first state that an attempt to differentiate between "arrest" and a "seizure and deten-

² As in *Brown*, petitioner made a subsequent stenographic statement to the police some hours after the first statement was completed. However, this second statement, although found to be voluntary at the February 24, 1972 Suppression Hearing, was not admitted into evidence at his trial. Further, there was absolutely no mention of this second statement at the August 3, 1976 Suppression Hearing nor was any evidence or argument offered to show its "attenuation." That statement was clearly and unmistakably a product or "fruit" of the first. See *Brown v. Illinois*, *supra*, at 605 Footnote 12.

tion" for purposes of lessening one's Fourth Amendment rights undeniably contradicts the premise and basic purpose of the Fourth Amendment; which is, the right of our citizens to be secured in their persons and homes. Clearly, the drafters of our constitution felt that a warrant should issue *only* when based on probable cause. *Katz v. United States*, 389 U.S. 347 (1967). This writer firmly believes that when the police action constitutes a "seizure" under the Fourth Amendment and when the police are acting without probable cause and without a warrant, it is not logical to believe that their "seizure" of a citizen without a warrant can be based on less than probable cause. *Terry v. Ohio*, *supra*, at 38 [Douglas, J., dissenting]. However, this Court has held to the contrary (See, *Terry v. Ohio*, 392 U.S. 1 (1968)) and petitioner respects that ruling, as well as the fact that "*Terry* begrudgingly accepted the necessity for creating an exception from the warrant requirement of the Fourth Amendment." *Adams v. Williams*, 407 U.S. 143, 154 [Marshall, J., dissenting].

In *Terry*, the Court stated, "[W]e thus decide nothing today concerning the constitutional propriety of an investigative 'seizure' upon less than probable cause for purposes of 'detention' and/or interrogation." *Terry v. Ohio*, *supra*, at 19, footnote 16. Later, this Court went on to state, "The ruling below, that the State may detain for custodial questioning on less than probable cause for a traditional arrest, . . . , goes beyond our subsequent decisions in *Terry v. Ohio*, 392

U.S. 1 (1968) and *Sibron v. New York*, 392 U.S. 40 (1968)." *Morales v. New York*, 396 U.S. 102, 104-105 (1969)³ Therefore, if Petitioner Dunaway was not "arrested" but "seized for purposes of detention and interrogation" the question left open by this Court in *Terry* must now be answered. To reiterate, may a person be "seized" on less than probable cause for purposes of detention and interrogation? The petitioner most respectfully submits that such police action violates the Fourth Amendment, especially under the facts of this case.

A: "ARREST" V. "SEIZURE AND DETENTION AND INTERROGATION"

When a citizen is apprehended or "seized" by the police and is "detained" by being placed in a police car and taken to police headquarters, he is clearly in the exact same position as one who is "arrested" by police. This writer honestly sees no reasonable basis which would allow for a rational distinction between

³ It is interesting to note that the New York Court of Appeals persisted in reaching the same conclusion on the remand of that case by this Court (*People v. Morales*, 42 N.Y.2d 129 (1977)). However, that court also held, "Since the finding of the trial court [that the defendant *consented* to the police detention] is supported by the record, we are precluded from upsetting it [citations omitted]. Therefore, as an alternative basis for our holding in this case is that the defendant *consented* to the police detention." (*People v. Morales*, *supra*, at 138, emphasis added) No finding of *consent* has ever been made in this case.

the status of two people so situated. See, *Davis v. Mississippi*, 394 U.S. 721, 726-727 (1969). In *Davis*, the petitioner was "seized" and "detained" on two separate occasions; first, on December 3, 1965 and, a second time on December 12, 1965. The second detention lasted at least two days. Davis' fingerprints were taken by the police during each of the detentions. This Court held that both the December 12-14 and the December 3 detention violated Davis's Fourth Amendment rights, despite the fact that the State argued that the December 3 detention was of a type which did not require probable cause (This case was decided after this Court's decision in *Terry v. Ohio*, *supra*). See, *Davis v. Mississippi*, *supra*, at 726. The Court answered that argument by stating:

"... to argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment. Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigative detentions' (footnote omitted). We made this explicit only last Term in *Terry v. Ohio*, 392 U.S. 1, 19 (1968), when we rejected the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a 'technical

arrest' ... *Davis v. Mississippi*, *supra*, at 726-727.

Petitioner Dunaway is aware of the fact that the police action in *Davis* was referred to as "dragnet" in nature (See, *Davis v. Mississippi*, *supra*, 728, Harlan, J., concurring). However, it is most important to note that the Court's holding involved a finding that Davis' rights were singularly violated. *Davis*, individually, was found to have been "seized" or "arrested" when he was taken to the police station on December 3 for fingerprinting. I am sure that Court was upset with the "dragnet" police operation, but the fact still remains that it was Davis' constitutional rights that were specifically violated by the police action.

Other situations can be envisioned which would result in a "seizure" and a less serious "detention for questioning" (i.e. questioning a person on the street in the setting outlined in *Terry*). See, *Terry v. Ohio*, *supra* at 34-35, White, J., concurring. However, since that factual setting is not before the Court in the case, it should suffice to say that regardless of the label attached to describe the citizen police confrontation, be it "arrest," "seizure," or "detention," the Fourth Amendment safeguards apply. *Terry v. Ohio*, *supra*; *Davis v. Mississippi*, *supra*.

B: "REASONABLE SUSPICION"

In affirming petitioner's judgment of conviction, the New York Court of Appeals ordered a limited

hearing in which the lower court was to determine whether probable cause existed for Dunaway's "detention" (*People v. Dunaway*, 38 N.Y.2d 812 (1975)). The trial court clearly found that there was no probable cause for petitioner's "arrest" (A-121). On appeal, in affirming the finding that probable cause did not exist, the Appellate Division for the first time found that the information the police had amounted to "reasonable suspicion" (*People v. Dunaway*, 61 A.D.2d 299, 302 (Fourth Department, 1978)). Petitioner strongly disagrees.

First, the information obtained from the first untested informer (Sparrow) was established as having been untrue. It was Sparrow's hearsay information that Cole and Irving were involved in the Tower of Pizza murder (A-51). Cole *denied* any involvement! Now Cole, while exonerating himself, relays multiple hearsay information that "BaBa" Adams and Irving were involved (A-52-53). The source of Cole's information (Hubert Adams) was incarcerated and available, yet the police made *no* effort to contact him. It is more than reasonable to assume that an individual involved in a homicide would try to exonerate himself and point the guilty finger at someone else. But in this case the police did not seek to substantiate Cole's information. They choose to apprehend Irving and to interrogate him.

Petitioner finds it hard to believe that such information constitutes "reasonable suspicion." In view of the fact that neither of the informers here were ever

even met by the police before they obtained the information and where the information given was an attempt by the provider to exculpate himself, it defies reasonableness to allow a seizure, such as the one in the case at bar. *Terry v. Ohio*, *supra*, at 21. Further, it is significant to note that no effort was made to establish the fact that other practical, alternative investigative techniques were exhausted. The "seizure," "detention" and "interrogation" of a citizen should not be tolerated on such pitiful information. This Court has appropriately noted, "Some tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized." *Adams v. Williams*, *supra*, at 147. The information in the case at bar clearly falls within that description.

C: RATIONALE FOR TERRY DECISION

In *Terry*, this Court was faced with the very serious task of balancing the rights of our citizens to be secure in their persons against the power of the police to "stop and frisk" suspicious persons *on the streets*. Faced with this vexatious task, this Court developed a "very narrow" exception to the Fourth Amendment's requirement of probable cause (See, *Adams v. Williams*, *supra*, at 161-162, Marshall, J., dissenting) and, in so doing, developed a "reasonableness standard." As the Court stated, "... the central inquiry under the Fourth Amendment [is] the reasonableness

in all the circumstances of the particular governmental invasion of a citizen's personal security." *Terry v. Ohio*, *supra*, at 19. This special standard had to be developed to accommodate the "on-the-spot observations of the officer on the beat" who "as a practical matter could not be subject to the warrant procedure." The factual context of *Terry* is obviously not present in the case of *bar*. The police here had ample opportunity to obtain a warrant. The reason they failed to obtain one was the fact they *knew* they did not have sufficient information to approach a court and obtain one (A-60). Clearly, that conduct has not been condoned by this Court which stated, "We do not retreat from our holdings that the police *must*, whenever practicable, obtain advance judicial approval of searches and *seizures* through the warrant procedure (citations omitted)." *Terry v. Ohio*, at 20; emphasis added.

The police action in *Terry* was found to have been reasonable because (1) the information obtained by the police was gathered while making observations "on the beat" (i.e. the information was fresh), (2) which needed to be acted upon immediately in view of the exigencies of the situation. (3) The "seizure" or confrontation took place on the street (4) for a reasonably brief period of time.

D: APPLICATION OF TERRY "REASONABLENESS STANDARD" TO THE FACTS OF THIS CASE.

None of the factors which existed in *Terry* to justify the application of a "reasonableness standard" are

present in this case. First, the information obtained by the police was more than two months old and it was obtained more than four months after the incident. It was, therefore, stale. See, *Sgro v. United States*, 387 U.S. 206 (1932). Secondly, there was no immediate need for the police to "seize" Dunaway. They were not expecting him to flee nor was there any indication he might be leaving the area. Plainly stated, there was absolutely no exigent circumstance which justified obviating the warrant procedure. Third, the "seizure" of petitioner was to take place at his home, a place that has been highly protected by this Court (See, *Coolidge v. New Hampshire*, 403 U.S. 443, 474-478 (1971); *United States v. Watson*, 423 U.S. 411, 433, Stewart, J., concurring (1974); *Dorman v. United States*, 435 F2d 384, 390-391 (D.C. Cir. 1970)). This case does not present an "on the street" confrontation which would require immediate action. The police had ample opportunity to plan the method of petitioner's seizure as evidenced by Detective Luciano's actions of standing watch in petitioner's driveway in case someone tried to leave by the side door. Further, to apply a reasonableness standard to stationhouse detention for purposes of interrogation would be to overlook the "inherently intimidating" environment associated therewith. *Miranda v. Arizona*, *supra*, at 445-448. The officers' actions here speak only for one rational inference—they wanted the petitioner in their exclusive control, incommunicado, for purposes of interrogation. (See, *People v. Anderson*, 46 A.D.2d 140 (Fourth Department, 1974) *affd.* 42

N.Y.2d 35 (1977), where a Rochester youth was questioned by Rochester police for 19 hours until he confessed to a homicide and there was no probable cause for that detention). Lastly, petitioner respectfully submits that petitioner's detention was not "reasonably brief" under the standard developed in *Terry*. Here the petitioner was taken from a private dwelling, placed in a police car, driven downtown and interrogated. This confrontation lasted more than an hour and one-half. In *Terry*, the confrontation was found to be reasonable in that it lasted only minutes. It also appears that the original confrontation in *Davis v. Mississippi, supra*, was brief since it involved fingerprinting and apparently brief questioning.⁴ Nonetheless, that "seizure" as well was found to have violated the Fourth Amendment.

Clearly, the police action in this case was not reasonable when viewed "in light of all the exigencies of the case" which is "a central element in the analysis of reasonableness," (See, *Terry v. Ohio, supra*, at 17-18 Footnote 15) since none existed.

In conclusion, the petitioner respectfully submits that in situations where the police "seize," "detain" and "interrogate" an individual *at police headquarters*, probable cause is required. Even if this Court was to determine otherwise, the police action must be reasonable in light of the factors enunciated by this

⁴ See *Davis v. Mississippi, supra*, at 722, 728.

Court in *Terry*. Clearly, the police action in this case of "seizing and detaining" petitioner at police headquarters for interrogation on such a dearth of information should not be found to be reasonable, especially, in view of the other factors affecting reasonableness heretofore discussed.

CONCLUSION

Wherefore, for the foregoing reasons, petitioner respectfully requests that the judgment below be reversed.

Respectfully submitted,

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